WAR POWERS LEGISLATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS

OF THE

COMMITTEE ON FOREIGN AFFAIRS

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

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FOREWORD

This document contains the printed proceedings and contributed statements on a variety of bills and resolutions introduced into the 92d Congress affecting the war powers of Congress and the President.

The Subcommittee on National Security Policy and Scientific Developments held only 2 days of hearings on these proposals because of the extensive hearings it conducted in 1970 on the same subject.

Those hearings, printed under the title "Congress, the President and the War Powers," resulted in full committee and House approval of a war powers resolution near the end of the 91st Congress. When the Senate failed to act, however, the resolution lapsed with the final adjournment of that Congress.

As chairman of the subcommittee, I reintroduced a slightly modified version of the House-passed resolution into the 92d Congress as House Joint Resolution 1. The text follows:

[H.J. Res. 1, 92d Congress, first session]

JOINT RESOLUTION Concerning the war powers of the Congress and the President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress reaffirms its powers under the Constitution to declare war. The Congress recognizes that the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.

SEC. 2. It is the sense of Congress that the President should seek appropriate consultation with the Congress before involving the Armed Forces of the United States in armed conflict, and should continue such consultation periodically during such armed conflict.

SEC. 3. In any case in which the President without specific prior authorization by the Congress—

(1) commits United States military forces to armed conflict;

(2) commits military forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes; or

(3) substantially enlarges military forces already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating his action;

(B) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization;

(C) the estimated scope of activities; and

(D) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

SEC. 4. Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties.

During the hearings recorded in this document, House Joint Resolution 1 was considered along with other war powers proposals. Once

again the subcommittee was convinced of the wisdom in the approach to the war powers issue embodied in House Joint Resolution 1. Thus, on June 8 the subcommittee voted to approve it without amendment for full committee action.

At the present time House Joint Resolution 1 is awaiting action before the House Committee on Foreign Affairs. Believing as I do in the practicality and effectiveness of that resolution, it is my hope that passage will be expeditiously accomplished by the Congress.

CLEMENT J. ZABLOCKI,
Chairman, Subcommittee on National Security Policy and Scientific Developments.

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WAR POWERS LEGISLATION

TUESDAY, JUNE 1, 1971

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2172, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

BACKGROUND OF HEARINGS

Mr. ZABLOCKI. The subcommittee will please come to order.

Today the Subcommittee on National Security Policy and Scientific Developments opens 2 days of hearings on pending bills and resolutions concerning the war powers of Congress and the President.

Last summer this subcommittee held extensive hearings on war powers legislation. We took testimony from some 23 witnesses, including Members of Congress, private experts, and spokesmen for the executive branch.

As a result of those hearings, the subcommittee drafted a joint resolution on the war powers which was unanimously approved by the full House Foreign Affairs Committee and passed the House of Representatives on November 16, 1970, by a vote of 288 to 39.

Because of the failure of the Senate to act, that resolution lapsed with the end of the 91st Congress. A similar resolution has been introduced into the 92d Congress as House Joint Resolution 1.

That resolution and a number of other proposals which have been introduced on the subject of war powers will be considered during these hearings.

Because of the extensive hearings held last year, this series is to be limited to Members of Congress and representatives of the executive branch.

INTRODUCTION OF CONGRESSMAN FASCELL

Our first witness this afternoon is the Honorable Dante Fascell, a distinguished Member of Congress from Florida. It was he who introduced the war powers bill in the 91st Congress which resulted in the 1970 subcommittee hearings and the eventual passage of a resolution. Congressman Fascell participated actively in those hearings and in the sessions during which the subcommittee's resolution was drafted. He also was active during floor debate on the resolution.

No man in the Congress has done more than he to focus the attention of the Congress on the war powers issue in an effort to find a

means to insure future cooperation between the Congress and the President on behalf of our Nation.

Mr. Fascell, we are pleased to have you come before the subcommittee and look forward to your testimony.

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FASCELL. Thank you, Mr. Chairman, and members of the subcommittee.

It is a special privilege to once again testify before the National Security Policy Subcommittee on the war powers of the Congress and the President.

Thanks to you, Mr. Chairman, and to the other distinguished members of this subcommittee, much has happened in the last 11 months to clarify the respective responsibilities of the Congress and the President under the Constitution to initiate, to conduct, and to conclude armed hostilities with other nations.

One year ago, almost no one in the House of Representatives had drawn upon the experience of Vietnam to call for a basic reappraisal of the way this Nation involves itself in war. The Cambodian incursion which involved U.S. forces in combat without prior congressional consultation or authorization made clear to many more, myself included, the need for such a comprehensive review of the war powers of Congress and the President.

To serve as a vehicle for that reappraisal and as a catalyst to a discussion of this vital constitutional issue, I introduced a bill, H.R. 17598, on May 13, 1970, to define the authority of the President to intervene abroad or make war without the express consent of Congress. The bill gathered a significant number of cosponsors and a fair amount of attention—some friendly, and some otherwise, as had been intended.

BILL ACHIEVED REAL PURPOSE

But, Mr. Chairman, the bill achieved its real purpose—a full discussion of the many delicate constitutional and practical issues involved—when you, with your characteristic generosity and responsiveness, agreed to hold hearings.

And hold them you did—from June 18 to August 5 last year. Mr. Chairman, I can hardly say enough in praise of you, the members of the subcommittee, and your able staff consultant, Mr. Jack Sullivan, for the comprehensive manner in which you have approached this most complex and delicate subject. The hearings were among the most carefully structured and thorough it has been my privilege to attend. And, I might add—that the full attendance of subcommittee members, and many members of the full committee reflected the importance of the subject.

Out of those hearings came a consensus about how to begin to restore a proper constitutional balance between Congress and the President and a joint resolution based on that consensus. That resolution passed the House overwhelmingly last fall, but died when the Senate failed to act. The same resolution, slightly modified, House Joint Resolution 1, is again pending before the subcommittee. I fully supported the resolution last year, and I wholeheartedly endorse it again this year.

HOUSE JOINT RESOLUTION 1: IMPORTANT FIRST STEP

But, Mr. Chairman, if I thought that the only thing that had come out of last year's hearings was House Joint Resolution 1, I would oppose it. For we cannot delude ourselves that one bill—or a series of bills—will by themselves give this Nation the kind of control over how we go to war that we need. House Joint Resolution 1 is an important first step toward reestablishing necessary congressional authority in the area, and it should become law, but by itself it is not enough. What is needed is a whole network of mechanisms, but, most of all, of attitudes which will insure:

That American soldiers will never die unless it is absolutely necessary;

That this Nation will never again go to war bit-by-bit with a minimum of consideration;

That if we must ever go to war again, it will be only with the deep and widespread understanding and support of the American people; and

That never again will the only choice we have to counter indirect aggression and subversion be U.S. military intervention.

Mr. Chairman, let me elaborate for just one moment on this last point. Clearly, when an ally is attacked overtly and in large numbers, we will probably have no alternative but direct involvement. But short of that kind of aggression, when we get to the point where the only way we can keep an important nation friendly is military intervention, then our policy has failed. If we are to avoid future Vietnams, then we in the free world must evolve nonmilitary policies to counter subversion, but most importantly we must develop imaginative and constructive ways of thinking about these problems. Only by building in alternative approaches can we avoid getting locked into situations which are doomed to escalation, because both sides have locked their thinking onto only one possible course of action and reaction.

1970 WAR POWERS HEARINGS CHANGED ATTITUDES

Mr. Chairman, perhaps the most important thing which came out of last year's hearings was just such a change in attitudes. For the hearings, along with last year's Senate and House debates, produced a widespread public discussion of the war powers. This discussion led to a change in attitude which this year has seen renewed and wider interest in the subject in the House, including a number of resolutions including one by my colleague from Florida, initiation of hearings for the first time in the Senate, and support for war powers legislation by the chairman of the Senate Armed Services Committee. Clearly, we have come a long way, but just as surely we have a long way to go before we can feel secure in the knowledge that we have done all we can to be certain that the vast military forces we have created are subject to the fullest possible restraints of reason.

The place to begin to prevent our needless involvement in future wars, Mr. Chairman, is right here in Congress, right here in this subcommittee. Not simply by passing more laws, though some like House Joint Resolution 1 and perhaps other stronger ones are needed, but by insisting that present laws are carried out; by asserting the constitutional prerogatives and powers that are already ours.

Ultimately, the accountability of both the President and the Congress is up to the people. They are the ultimate check, but in the meantime it is up to both our branches, executive and legislative, to constantly question each other on the policies of either branch which might lead to that most solemn of all governmental decisions, war. Hopefully, this constant questioning can take place through agreed-upon arrangements so that the President and Congress can work together as urged in the subcommittee's report last year, "in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation." But take place it must—whether in a spirit of consultation or otherwise.

NO SUBSTITUTE FOR CONGRESSIONAL REVIEW

For our part here on the Foreign Affairs Committee, there can be no substitute for systematic and periodic congressional review of exactly where and under what conditions and to what extent the United States is and should be willing to fight in any particular instance. The recent substantial increase in the committee's staff should help toward accomplishing the goal, but I would hope the committee would also take steps to institutionalize procedures insuring such a review. In addition, regardless of a Presidential report, we must provide for prompt consideration of crisis situations as they arise to insure congressional participation in the decisionmaking process.

JORDAN CRISIS: NO CONGRESSIONAL CONSULTATION

Let me be specific. Last year, during the strife in Jordan, consideration was given to sending in U.S. forces. There was time for full, though perhaps secret, congressional consultation. There was none. Why? We could have gotten into a very major war. But that is not the point. Congress should have been thoroughly consulted and authorization sought in advance of sending troops in.

Mr. Chairman, in 1941, Walter Lippmann wrote of this "gray area" of executive and legislative relations: "This difficulty can be resolved, but only by the display of self-restraint, objectivity of mind and magnanimity which are rare in public life."

For our part, Mr. Chairman, you and this subcommittee have shown that the Congress can and will show this kind of an attitude in restoring the proper balance between necessary Presidential flexibility and essential congressional control.

I most recently again learned, in the somewhat arbitrary and unannounced waiver of the congressional limitation on arms sales to Latin America, that the Executive has not yet come to share the point of view that "consultation, common counsel and continuing accountability" are essential to viable foreign and defense policies. Through your efforts and those of others in the Congress, I am hopeful that both the Executive and the Congress will have a new understanding of the relationship of one to the other, and that from this can flow more thoughtful and reasonable policies minimizing the risks of unnecessary war.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Mr. Fascell, for an excellent statement.

I particularly take comfort in the quote of Mr. Lippmann. I am sure when he refers to those characteristics that are rare in public life he also includes newspapermen.

IS A STRONGER RESOLUTION NEEDED?

Seriously, however, I want to ask you about your preference for strengthening House Joint Resolution 1. You do mention on page 3, and again further on in your statement, that it would be desirous to have a stronger resolution than House Joint Resolution 1.

Mr. FASCELL. I said it might be necessary, Mr. Chairman.

Mr. ZABLOCKI. That is right. The point, however, is that we could have a very strong wording in a resolution which would not become law, through a simple House or Senate resolution. Or we could attempt to pass a resolution seeking cooperation between the executive and the legislative which would be acceptable to both and be made part of the law, and to that extent, clarify the gray area in the Constitution.

Which, in your opinion, would be preferable?

Mr. FASCELL. Mr. Chairman, the point you make is a very valid point in my judgment and one not to be dismissed lightly. I think it would be adding to the problem, let us put it this way, if we passed a simple House resolution or Senate resolution or a concurrent resolution, no matter how strong it is, because, after all, it takes the announced and practiced intention on the part of the Executive to make this thing work.

Therefore, I think it is extremely important to submit for the Executive signature whatever is passed by the Congress.

Mr. ZABLOCKI. As the gentleman well knows because he worked with the subcommittee, there was, was there not, a definite tacit understanding about the resolution that we worked on, that it would indeed be very likely that the signature of the President would be appended?

Mr. FASCELL. I got that impression, Mr. Chairman. You did work very closely with the administration. After all, that is part of the concept in establishing the policy. It seems to me that this is the first step. I don't know how else you can change the attitude or the policy or how you can even begin to institutionalize it unless it does become a matter of law with the agreement of the Executive that it will be fully implemented.

Mr. ZABLOCKI. Therefore, I would definitely appreciate, my colleague—and I value your counsel and your wisdom in this area—if it might be necessary to have a more strongly worded resolution, just what would you include?

Mr. FASCELL. Mr. Chairman, I had not given any detailed thought to that. You have many suggestions which might be incorporated. I have just seen this chart which is an excellent means of comparison, by the way, of all the resolutions pending. There might be some better way, for example, to institutionalize the arrangement. I don't know. I haven't given it that specific consideration.

ANNUAL AUTHORIZATION FOR STATE DEPARTMENT

Mr. ZABLOCKI. As you well know, in the other body the chairman of the Foreign Relations Committee has introduced a proposal which would provide annual authorization for operating funds of the State Department and USIA.

Would you favor such legislation as a means of obtaining greater influence for Congress, increased influence on foreign policy and national security decisions?

Mr. FASCELL. I do not quite follow that, frankly. It is kind of like the ball-bat approach. I do not see how you can work on administrative funds to influence policy because the ultimate threat is that you are going to shut down the Department if they don't do what you want to do. I don't see that as a satisfactory answer. It might be useful.

Mr. ZABLOCKI. As a threat?

Mr. FASCELL. Yes. But it is not the kind of thing we are talking about here where you have divided powers under the Constitution, particularly with respect to the issue of war.

On the other minor things, I don't think there is any question how effective it would be to hold back their funds for administering the Department. I think you could get all kinds of agreement out of that.

Mr. ZABLOCKI. Thank you very much, particularly for that last observation.

Mr. Findley?

Mr. FINDLEY. Mr. Fascell, I want to join the chairman in congratulating you on the early initiative you made about a year ago and on your statement here today.

Mr. FASCELL. I thank you. It is certainly no earlier than yours because you were one of the first in this area.

APPLICATION OF RESOLUTION TO LAOS INVASION

Mr. FINDLEY. As I have discussed this proposal with constituents and people elsewhere, they have raised the question as to how the enactment of House Joint Resolution 1 would change the situation that prevails today. If we take the introduction of our airpower into Laos earlier this year, I think we have a case in point, do we not?

Mr. FASCELL. Yes.

Mr. FINDLEY. As of that date, the Tonkin resolution had been repealed by the Congress, so the President could not draw upon that document as his authority for military action over Laos. But, as I understand House Joint Resolution 1, had it been on the books, the President would have had the obligation within a very few days to present in writing a report to the Congress stating the factors that caused him to take this action and citing his legal, constitutional, and treaty authority for so acting.

Mr. FASCELL. The gentleman cites a very specific case of the application of the resolution. There is no question about it.

Mr. FINDLEY. I think it is quite possible that this report would be received and filed, but at least the President would have placed before the Congress, and this subcommittee, a very important report concerning military action that he had taken. It would then be the burden of the Congress to take a look at that report, perhaps hold hearings on it, and if it deemed advisable, pass judgment upon whether or not the President acted properly.

Mr. FASCELL. The gentleman from Illinois is quite correct, because what it does, you see, is institutionalize the recognition of the role of the Congress. Up to now, this has been set in precedent as a kind of

arm's-length proposition; sometimes it works well and sometimes it does not work at all.

Here we would have the opportunity by law to institutionalize at least that aspect of it.

It seems to me that is worthy of accomplishment.

Mr. FINDLEY. It would establish a formal relationship between the President and the Congress in respect to war powers where no such relationship exists today.

Mr. FASCELL. Except by precedent, practice, and procedure.

COMMENTS ON THE JAVITS PROPOSAL

Mr. FINDLEY. The Senate committee seems to have pretty well embraced the Javits' approach, which seeks to define the reserve powers of the President and to set a 30-day time limit on the President in using military force under these reserve powers.

Do you have any comments on the Javits' approach?

Mr. FASCELL. Yes, I do. The objective, of course, is laudable, but, when one extends the application of that requirement one can foresee a fantastic amount of difficulty, it seems to me.

Mr. FINDLEY. Could you illustrate that point?

Mr. FASCELL. For example, the President commits troops abroad in an engagement. Now, under the requirement in 30 days, if Congress does not act, the President must automatically terminate—is that my understanding of the language?

Mr. FINDLEY. That is the way I read it.

But the question comes to my mind whether he could really escape his constitutional responsibility because Congress passed the law.

Mr. FASCELL. Of course he could not. I don't see how he could comply with it. That is No. 1.

If he is in that kind of serious situation, he would say, "Under my right and obligation and authority under the Constitution, I am going to ignore that provision," period. That is all there is to that.

What is the enforcement? The alternative is impeachment. A direct confrontation with the Executive on that kind of issue seems to me to be of little value to us at the time of some emergency, at least an emergency which the President in his judgment has seen fit to commit the Nation to. That is problem No. 1.

Problem No. 2: Supposing we are in this subcommittee and the Nation has been committed to war by the Executive? Are we at the end of 30 days going to just say, "Well, that is the end of that."

By doing nothing, we force him to quit. Suppose, however, we hold hearings within the 30-day period, and then we act affirmatively? In other words, are we forced to ratify the action? What would be the end result?

I don't know, but my experience tells me that when the Executive is that serious in the commitment of the Nation to war the Congress is pretty much apt to follow that commitment.

HISTORY OF CONGRESS AND WAR DECLARATIONS

Mr. FINDLEY. In our history has there ever been a circumstance in which the Congress failed to respond to a Presidential request for a war declaration or an instrumentality of similar sort?

Mr. FASCELL. Not that I can recall. As a matter of fact, as we all know, there are various ways of doing it without putting the Congress and the Executive in direct confrontation in that period of time. For example, we still have the constitutional control over the expenditure of funds where there is no constitutional conflict there whatever. But I am afraid that just on the policy decision, which is where this resolution stops, this would then present a different problem entirely.

Besides that, you would have different committees involved. I am thinking of the leadership we would have to have in the followup of this issue on the floor.

In one case, you would have the Foreign Affairs Committee on strictly a policy question. In another case, you would have Armed Services, and Appropriations on the followup question.

Which would prevail?

In the final analysis, you know, if you have the votes you win. If you don't have the votes, it makes no difference what you said in the committee. That is the problem I see with that. In other words, it seeks to put an element of enforcement which actually doesn't exist in the final analysis and it could become an instrument of automatic ratification.

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Bingham?

A PROPOSAL BY MR. BINGHAM

Mr. BINGHAM. Thank you, Mr. Chairman.

I would like to say that, as usual, I find myself in substantial agreement with everything the gentleman from Florida has said. I, too, feel that House Joint Resolution 1 does not go far enough. I have some proposals to make that would add to the authority to require the President to terminate a military action that he had commenced without a declaration of war.

Mr. FASCELL. Will the gentleman yield at that point?

I am sorry to say that I haven't read his bill, but I shall, particularly on that point.

Do I understand that you bring all other actions by the President except in case of a declaration of war by the Congress——

Mr. BINGHAM. As a matter of fact, I have submitted today a new bill which departs somewhat from the bill I introduced last year and earlier this year because I came to the conclusion that it was dangerous to try to spell out the conditions under which the President can move without the authority of the Congress. So, in my new proposal, I skipped all of that and simply state that in the event the President has initiated hostilities, that his authority to continue those hostilities could be terminated by action of either House in opposition. This seems to me to meet the gentleman's point, which I share, that the 30-day limitation is arbitrary, it may take place at a time when the Congress is stirred up and emotionally involved in the beginning of the action.

It is also arbitrary as to time. Thirty days from when might be a very difficult case to determine.

The theory of my resolution is that the President should be able to carry on this type of hostility only if he has at least tacit approval of both Houses of Congress, and giving either House the authority to

terminate his authority would be a much sharper tool to use than what we have now which is the funding tool.

Mr. FASCELL. I think I follow the general thrust of the gentleman's legislation.

POWER OF CONGRESS IN AN UNDECLARED WAR

The question always arises, you see, with this, unfortunately, as to whether we can in the Congress by legislative act, terminate the constitutional authority of the President. This is the $64 question. We can't resolve it in the Supreme Court and we can't get away from the enforcement process in terms of impeachment of the President. By that time, the hostilities would be over, you know.

Mr. ZABLOCKI. Isn't it a part of the problem that the President would not sign such a proposal, that it would not become law?

Mr. FASCELL. I don't know about that. I don't mean to be critical of the gentleman's proposal because he has given a lot of thought and effort to this issue. I just say that all of us who are involved in this thought process come up constantly against the proposition of how we can legislate against an enunciated constitutional prerogative of the Executive.

The answer is that you can't.

Mr. BINGHAM. But the gentleman would agree, I would think, that this idea of the degree to which the President has the constitutional authority to carry on war without a declaration is a very fuzzy area indeed in constitutional law.

Mr. FASCELL. Agreed.

Mr. BINGHAM. It is not at all clear that the President has that constitutional authority. So within that muddy area, I would think the Congress has a right to legislate.

Mr. FASCELL. It sounds like a good base for a beginning.

IMPORTANCE OF PRESIDENTIAL AGREEMENT

Mr. BINGHAM. May I just say in response to the chairman's comment, and I think the gentleman would agree, it is our responsibility as Members of the Congress to propose what we think is right and we should not be deterred by what the President might or might not sign, particularly since the present President will not permanently be in office and there may be another President who might sign such a resolution.

Mr. FASCELL. At least while it is a factor to be considered, I certainly would agree with the gentleman from New York that we ought to carry out our responsibility as we see it.

What has been going on for the last 11 or 12 months with respect to this issue is nothing but good and healthy. We have involved a lot of people and there is a great deal more interest in the whole subject matter. We may not satisfactorily resolve it even in this session of Congress but we made a healthy start.

I think that is good, and I compliment all of the members of the subcommittee for their attention to this subject.

Mr. BINGHAM. I would like to say in conclusion that I hope the gentleman will think further about in what degree House Joint Resolution 669 is incomplete and insufficient and what ought to be added to it by way of amendment.

Mr. FASCELL. I assure you I will review your latest proposal most carefully.

NEED FOR PRAGMATIC APPROACH

Mr. ZABLOCKI. Will the gentleman yield for a comment?

Mr. BINGHAM. Surely.

Mr. ZABLOCKI. I cannot help but quote Walter Lippmann, as you quoted in your statement:

> That this area where there is such great difficulty can be resolved only by the display of self-restraint, objectivity of mind and magnanimity.

Mr. FASCELL. Yes; but he means on both sides, Mr. Chairman.

Mr. ZABLOCKI. If we are going to be pragmatic about this and if we want something on the statute books, if we are going to really and truly carry out our responsibility, we must do something that is feasible or possible. We cannot wait on the next President or the President after that. We must do the best we can and get the most practical language. We don't want to bring about defeat before we get started.

Mr. FASCELL. To the gentleman from New York, I think I would like to say that I think this is an important consideration, that we can make a step, even though it may be a faltering step, in this area. I do believe it is essential, however, to submit the proposition to the Chief Executive. I think that is vital.

Otherwise, we leave ourselves strictly in the area of constant confrontation between the legislative and Executive and while each of us charged with carrying out our responsibilities under the Constitution won't shirk from doing that, we will not really have achieved that spirit of purpose here in dealing with a most difficult and sensitive issue of war.

TACTICS FOR PASSING RESOLUTION

Mr. BINGHAM. Could I comment further?

I think that what the chairman says and what the gentleman from Florida says does make sense, that it might be desirable to pass House Joint Resolution 669 as it is in the hope of getting the approval of the President if it were adopted. That would be a step forward, there is no question about that.

But I still think that it is appropriate for this subcommittee or the Congress as a whole to give thought to the other question whether or not there should be legislative restraint on the President.

Seriously, we have a number of candidates for President who are currently in the Congress. If they were to commit themselves to one of these proposals and were then to be elected, presumably they would sign such a resolution.

Mr. FASCELL. That is a good point.

Mr. ZABLOCKI. I think that is wishful thinking.

Mr. Morse?

HAS CONGRESS BEEN POWERLESS TO ACT ON VIETNAM?

Mr. MORSE. Thank you, Mr. Chairman.

Mr. Fascell, as one who is a new member of this subcommittee I have not been involved in this issue, so I am not nearly as well informed as my colleagues who are closer to the center of the subcommittee. But I do have a couple of questions that I would like to raise.

The first is an observation. I think it has become part of the public rhetoric in recent years because of our frustration about Vietnam, that the Congress has been powerless to act throughout the U.S. involvement in Southeast Asia.

Mr. FASCELL. It is often said but, of course, not true.

Mr. MORSE. Which is not true. It has not been a matter of power; it has been a matter of will. The Congress has not had a will to act. I think perhaps we mislead the American people when we talk about insufficient power. Now, I think your testimony clearly implies, and I agree, that by this resolution the Congress could not enlarge its own constitutional powers nor could we intrude upon the constitutional powers of the President. But as Mr. Bingham points out, it is a proper thing for us to seek to define with greater clarity the area of the President's constitutional authority. How would you think that House Joint Resolution 1 or any of the other resolutions which are before the subcommittee do enlarge congressional powers?

Mr. FASCELL. I don't see any enlargement of congressional power, Mr. Morse, at all. All I see is simply a formalizing of an arrangement and acknowledgement and recognition of the powers that do already exist.

SITUATION DEMANDS LEGISLATIVE FORMALIZING

Mr. MORSE. In other words, you think that if the degree of congeniality between the executive and legislative branches that Walter Lippmann spoke of were to exist, we wouldn't need this kind of legislation?

Mr. FASCELL. Well, I would say that given the speed and complexity of international problems as they exist today and as far as we can see in the future, I think we are going to have to insist on legislatively formalizing the relationship between the Executive and the legislative branch.

Up until now, it has been strictly a desire and willingness, whether it be political or genuine in the sense that it had no political motive, whatever the motive, carrying out the responsibility as the Chief Executive or the Commander in Chief. It has strictly been one that is at will, subject to getting the program through Congress or satisfying the Armed Services Committee or the Appropriations Committee, or whatever the case might be.

As a matter of fact, I think that has been a kind of weak reed in terms of the policy committee; namely, Foreign Affairs.

Because, if that were the criteria, then the only real fulcrum we would have would be the authorization of the aid program, which is no fulcrum at all.

So, then, you get down to the ultimate, how do you affect policy?

Mr. MORSE. Thank you very much, Mr. Chairman.

Thank you, Mr. Fascell.

Mr. ZABLOCKI. Mr. Findley?

MEANING OF TERM: "PROMPTLY"

Mr. FINDLEY. Mr. Fascell, House Joint Resolution 1 has the word "promptly" in section 3, which provides "The President shall submit promptly to the Speaker of the House and the President of the Senate this report."

For purposes of legislative history, how would you define the word "promptly"?

Mr. FASCELL. Mr. Findley, I certainly would say, not less than 24 hours and not more than several days, whatever that would be. It is a question of reasonableness again.

As I recall it, the subcommittee purposely stayed out of that kind of definition, recognizing the pressures on the Chief Executive to meet a deadline, by the same token making clear that we didn't want to have the thing dragged out until it was meaningless.

Mr. FINDLEY. I think one of the purposes behind this bill is to cause the Chief Executive and his advisers to take into account at a very early stage in their decisionmaking process this reporting requirement.

Mr. FASCELL. Certainly.

Mr. FINDLEY. The necessity to give a legal justification so that it won't be an after-the-fact exercise by third- or fourth-level lawyers in the State Department.

Mr. FASCELL. I agree.

If I were going to fix a time, myself, and be stuck with it, so to speak, I would say not less than 24 or more than 72.

Mr. FINDLEY. In other words, within 3 days at the most of the commitment.

Mr. FASCELL. Of the commitment.

Mr. ZABLOCKI. Mr. Bingham?

Mr. BINGHAM. I have no further questions.

Mr. ZABLOCKI. Again, our sincere thanks. We look forward to having your wise counsel and advice when we mark up the bill.

Mr. FASCELL. Thank you, Mr. Chairman.

INTRODUCTION OF CONGRESSMAN BINGHAM

Mr. ZABLOCKI. Our next witness this afternoon is the Honorable Jonathan B. Bingham of New York, a valuable member of this subcommittee who has done considerable work in the matter of war powers legislation. He is the author of H.R. 4194, a bill to limit the authority of the President to intervene abroad or to make war without the express consent of Congress.

Mr. Bingham, you may proceed.

STATEMENT OF HON. JONATHAN B. BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. BINGHAM. Thank you, Mr. Chairman, and members of the subcommittee.

I appreciate this opportunity, Mr. Chairman, to present some further views on the crucial matter of Presidential and congressional authority to engage in hostile foreign action in the absence of a declaration of war. You and the members of this subcommittee may recall that I was a sponsor in the 91st Congress of H.R. 18539, a bill to limit the warmaking authority of the President, and that I testified on that legislation before this subcommittee last July. H.R. 18539 has been reintroduced in this Congress as H.R. 4194.

Since that time, there has been a great deal of further discussion and legislative action on this matter. The House passed House Joint Resolution 1355 on November 16, 1970. The Senate failed to act on that or

similar legislation in the 91st Congress. This discussion has raised nagging doubts in my mind about some of the provisions that are being given serious consideration by the Congress, particularly in the Senate, and the American public, and has changed my thinking in several respects. As a member of this subcommittee, I look forward to the opportunity to pursue some of these issues in the course of questioning witnesses in these hearings, so I will not spend a great deal of time on them here. I do want to point out to the subcommittee at the outset, however, several conclusions I have reached which may be of interest.

FUTILE TO PRESCRIBE WAR CIRCUMSTANCES

First, I am forced to conclude that it is quite futile and unwise to attempt specifically to prescribe the circumstances under which the President may engage in hostilities in the absence of a declaration of war. If the criteria stated are sufficiently broad, they amount to no restraint at all. This is especially true since successive Presidents have shown themselves quite capable of interpreting congressional prescriptions to suit their own needs and to justify their actions. Surely, the Gulf of Tonkin resolution is a striking illustration. Highly restrictive criteria, on the other hand, could interfere with the President's capacity for quick, flexible response under circumstances that could prove tragic. The Javits bill, which I understand has been introduced by Congressman Tiernan, H.R. 4673, for example, in my view, would have inhibited or prevented President Truman from responding as he did to the invasion of South Korea. Similarly, the Javits bill could make it difficult for a President to respond adequately to a sudden Soviet-Arab attack in the Middle East.

I believe, with respect to the Javits bill, that in testimony before the Senate Foreign Relations Committee, Senator Javits said that in such a case if there were an invasion of Israel, the President could use the paragraph in his bill which refers to the necessity to protect the lives and property of U.S. nationals abroad.

Now, that illustrates my point. I think that would be a twisting of the purpose of that phrase.

It illustrates the point that an ingenuous mind can find an excuse under almost any set of criteria for doing what he wants to do.

So, it seems to me that any effort to prescribe circumstances in which the President is authorized to deploy combat forces is destined to fail either by imposing, in effect, no real restraint on the President or too much.

"30-DAY" PROVISION ILL-ADVISED

Second, it is my judgment that any deadline on Presidential or congressional action is ill-advised and probably unworkable. The 30-day provision of the Javits bill and the bill introduced by Congressman Chappell, with diverse cosponsorship, and very interesting cosponsorship, I might say, Mr. Chairman, after which Presidential action would have to be terminated unless continued by Congress, could well force the Congress into a premature decision or terminate Presidential action before a full assessment could be made of the situation.

This is precisely the point which was made earlier by Congressman Fascell.

Similarly, any time limit is likely to be arbitrary and none can hope to suit every circumstance.

There is also the procedural problem of determining when the specified time period commences. To base a time limit on a Presidential report of troop deployment has grave drawbacks. As recent experience indicates, Presidents can be slow to report to Congress, especially when foreign involvement occurs gradually, rather than through decisive action. How long after we became involved in Vietnam, for example, did the Congress receive a clear report of that fact from the President? When would we have started counting off 30 days with regard to our Vietnam involvement?

If we look at the wording of the Javits bill, and I am looking at the Tiernan bill, he refers to the "initiation of military hostilities under circumstances described in paragraph (a)."

Now, under that language, we would be hard put to say when we initiated military hostilities in Vietnam.

Indeed, if we were referring to something like the recent escalation of the war in Laos, it would also be difficult because we had initiated military hostilities of a sort over Laos a long time before that.

So, such questions seem to me to raise serious doubts about the practicability of any time limit on Presidential intervention.

PROBLEM OF "BLANK CHECK" TO PRESIDENT

Third, I believe Congress should not be placed in a position where it must act in order for Presidential action to continue. If the Congress does act, then the President receives a blank check to proceed as he sees fit from there on out, and the Congress is all too likely to be swept up in the enthusiasm of the moment, giving the President authority that it might later regret having given. Again, our dismal experience under the Tonkin resolution should be a warning. Rather, the responsibility and authority which the Congress now has—through the "power of the purse"—to restrict or terminate Presidential action should be spelled out clearly. What is now a blunt and awkward tool should be sharpened so that it can be used with more precision.

My conclusion from all this is that the authority to carry on hostilities in the absence of a declaration of war should continue only so long as the President has at least tacit approval of both Houses of Congress; in other words, either House, acting alone, should be able to "blow the whistle" on the President. Each House fully represents the American public, and the first body to reach a majority in opposition to Presidential action should be able to terminate it. There is clear precedent for such an approach in the Executive Reorganization Act, which stipulates that rejection by either House of the Congress is sufficient to kill a Presidential effort to reorganize the executive branch.

And, of course, any exercise of the power of the purse has to be approved by both Houses of Congress. So, lacking the approval of both Houses should be an indication that the President's authority is being exercised in a way that is, to say the least, sufficiently questionable so that it ought to be terminated.

NEW BINGHAM RESOLUTION: HOUSE JOINT RESOLUTION 669

With these thoughts in mind, Mr. Chairman, I have today introduced a modified version of the legislation I introduced in the last Congress—

House Joint Resolution 669. I have exercised my prerogative to change my mind, as you can see.

This proposed joint resolution reads as follows:

HOUSE JOINT RESOLUTION 669

To limit the authority of the President of the United States to intervene abroad or to make war in the absence of a congressional declaration of war

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That use of the Armed Forces of the United States in military hostilities outside the territory of the United States in the absence of a declaration of war shall be unlawful following the adoption by either House of the Congress of a resolution disapproving continuation of such use. Any such resolution of disapproval shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays. Any resolution so reported shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

Upon the adoption of any such resolution of disapproval, the President shall proceed at once to effectuate the immediate withdrawal to the United States or any territory subject to its jurisdiction of the United States forces involved, having due regard to the need to protect such forces from attack while in the process of withdrawal.

I would like to add on this, Mr. Chairman, to make clear that I am not opposed to House Joint Resolution 1 in its present form and indeed would support its adoption.

My resolution is drawn in such a way that it could be added as an amendment, additional section to House Joint Resolution 1, or it could be reported separately to the House for action as a separate joint resolution.

Thank you, Mr. Chairman.

THE BINGHAM RESOLUTION AND HOUSE PROCEDURES

Mr. ZABLOCKI. Thank you, Mr. Bingham. As usual, your statement is very helpful and well thought out. Personally, I want to fully agree with your observations on the Javits proposal, in particular, the portion of the Javits proposal which deals with the time limitation.

I have a question, however, on your resolution that you introduced just today. You actually often circumvent the House procedure of resolutions coming before the House for consideration when you say, "Any such resolution of disapproval shall, if sponsored or cosponsored by one-third of the Members of the House in which it originates, be considered reported." That would preclude any hearings, any action of the subcommittee, if just one-third of the membership could discharge a petition, a bill, or resolution for consideration of the House.

How do you square that with your fear of the Javits proposal?

On page 2 of your statement you say the Congress is all too likely to be swept up in the enthusiasm of the moment. You find some fault with that proposal in the Javits resolution. Apparently you are not concerned if even one-third of the Members, which could very well, as you stated in your statement, be swept up in the enthusiasm of the moment, sponsor or cosponsor a disapproval resolution.

How do you?

Mr. BINGHAM. First, with regard to committee jurisdiction, the section does say, "unless the Members of the House otherwise determine by yeas and nays."

The purpose of this wording is to assure that in the event of a majority of the House or of the Senate being of a mind to terminate the authority, that they would have that opportunity and could not be blocked by a filibuster. This language is essentially the same as that provided in Senator Javits' proposal to avoid the possibility of a filibuster. Under the provision that Members of the House could determine otherwise by yeas and nays, it seems to me it might quite well be that the Members of the House would vote by yeas and nays to refer the bill or resolution to the appropriate committee and ask for a report back within a certain length of time. But the purpose of that language is to prevent the possibility of a filibuster.

We have our ways, the Senate has its ways. We also have ways of filibustering.

FEAR OF ACTION ON MOMENT'S ENTHUSIASM

The second part of the chairman's question has to do with my possible fear of action in the enthusiasm of the moment. I think it is far less likely, in fact not something to be feared, that the Congress or one House thereof would express disapproval of Presidential action. I think that in the nature of things and human nature being what it is, in the early stages of a military involvement there is likely to be considerable enthusiasm and hoopla about it all, and I think that was indicated in the case of Vietnam.

What I am saying here is, and what this provision would provide is that if the majority of the Members of either House are prepared to vote to terminate the authority of the President, they should have that opportunity and that authority should then terminate.

QUESTIONS PROCEDURES FOR ACTION

Mr. ZABLOCKI. I still am not very clear about the provision "unless the Members of such House otherwise determine by yeas and nays."

The bill would have to be reported and indeed your resolution provides for it to be considered reported to the floor and then your yea and nay vote would be as a matter of action on the agenda. There is no expression on the part of the Members by a yea or nay vote whether it should be reported or not.

Mr. BINGHAM. This language preserves the right of the majority of the House or of the Senate in either case to work its will. If the majority of the House or the Senate wishes to have a committee study and a committee report, then under the terms of this they could have it, but the right of the majority to work its will would be preserved and would be assured and that right could not be prevented by the action of a minority.

What troubles me about filibusters is that it is the action of a minority imposing its will on the majority.

Mr. ZABLOCKI. If your proposal became law, the resolution introduced this afternoon could be considered on the floor tomorrow.

Mr. BINGHAM. That is right, provided that one-third of the Members cosponsored it.

Mr. ZABLOCKI. Do you think that procedure adds to the democratic process? Is not full consideration of such highly sensitive legislation as we are today considering helpful and warranted?

Mr. BINGHAM. I think in a case of that importance the majority of the House should be able to determine whether it is prepared to vote and vote if it so desired or to have further study given to the proposition. But the majority of the House would be in control and not the leadership, not any committee, not any minority. The majority of the House would be in a position to work its will.

Mr. ZABLOCKI. I have gathered from your last comment in your statement that indeed House Joint Resolution 1 you fully agree with in its present form; for example, you are not opposed to having the President keep Congress informed or that he report.

Mr. BINGHAM. Absolutely not.

Mr. ZABLOCKI. Your proposal is intended to be an addition.

Mr. BINGHAM. That is right.

Mr. ZABLOCKI. I have no further questions.

Mr. Findley?

PROBLEM OF "GLANDULAR REACTION"

Mr. FINDLEY. Mr. Bingham, I think we are all indebted to you for a very imaginative proposal and one which I think deserves very careful examination.

I share the concern of the chairman about the swiftness with which the resolution might be brought to a vote.

There comes to mind the almost glandular reaction that occurred in this country after the conviction of Lieutenant Calley. I have an idea that if a similar procedure had been available, the Congress might have voted him the Congressional Medal of Honor the day after his conviction, so lopsided and emotional was the reaction.

Yet I think the attitude of the American people as well as the Congress has considerably changed. I know that minority tactics can be oppressive and thwart the will of the majority, but I think it is also fair to quote the Parliamentarian, Lew Deschler, that there is always a way for a determined majority to work its will.

I would be constrained to modify at least those portions of your resolution to make possible a more deliberate consideration by the Congress. The Congress has been referred to as a study and deliberative body, rather than an action body. I think that definition has some merit.

PROBLEM OF FUTURE CONSTITUTIONAL CONFRONTATION

The other comment I would make, Mr. Bingham, is that inevitably the provisions of your bill would lead to a constitutional confrontation of some degree at some future date. It could well be that a President in this decade perhaps could be persuaded to sign a bill which would contain such a provision but a successor might take a different view of his constitutional responsibilities.

I wonder if it is wise to place in the hands of just one body of the Congress the authority to force a constitutional confrontation. For example, after the attack on Pearl Harbor, theoretically a President might have deemed it his responsibility to pursue the attackers despite

a resolution by the Senate or the House ordering him to withdraw forces.

How would you visualize a confrontation like that being resolved?

Mr. BINGHAM. I think my only answer to that, Mr. Findley, is that the exercise by the President of the power, in effect, to wage war without a declaration is such an extraordinary power that it should not be exercised unless both Houses are prepared to give at least tacit approval. I am not asking them to give explicit approval as the Javits bill does, but at least tacit approval.

I think it would be better to have such a constitutional confrontation, if one occurs, than to be in a position of uncertainty such as we are in today.

I don't think the majority of either House today would be prepared to vote to terminate the President's authority to carry on hostilities in Vietnam but if that were the case, then a confrontation would be inevitable. It would probably take place in regard to a funding resolution. That is why I think it is better to have a clear-cut procedure, rather than have to depend on a clumsy instrument like cutting off funds.

NOT WEDDED TO TIMING MECHANISM

I would like to say, also, in response to the gentleman's question and the chairman's question about the timing part of this resolution, I am not wedded to that. I don't think that it is an essential part of this that the resolution be brought up within the day. That language is taken word for word from the Javits resolution, and I think was directed primarily at the problem of the filibuster in the Senate.

If you were dealing in terms of either the Javits type of resolution or this type of resolution, I think you have to have some provision to prevent a filibuster. What that provision should be, I don't know, but I certainly am not wedded to this particular language.

It may be that this calls for a schedule that is too short. I would not object to changes in that regard. I think that might very well be desirable.

Mr. FINDLEY. Thank you.

RESOLUTION EFFECT ON TREATY OBLIGATIONS

Mr. ZABLOCKI. I have a further question.

Your resolution provides for adoption by either House of the Congress:

> The use of the Armed Forces of the United States in hostilities outside the territory of the United States in the absence of a declaration of war shall be unlawful following the adoption by either House of Congress of a resolution disapproving continuation of such use.

What if our troops are used in a territory outside the United States in keeping with a treaty agreement, how would your resolution of disapproving continuation of our treaty—would this not in effect abrogate a treaty?

Mr. BINGHAM. Would it affect what?

Mr. ZABLOCKI. If your resolution became law, would it be possible for Congress in one swift move to abrogate a treaty, a commitment we have in mutual defense of a country?

Mr. BINGHAM. I think this is right, but the Congress also has the power to cut off funds in such a case. It has that power today. The

problem in the case of a treaty is likely to be whether the use of troops is required under the treaty.

The United Nations charter is also a treaty. The use of troops under a resolution of the Security Council might be claimed to be that type of resolution.

I think that the answer in these cases is that if there is a firm obligation and something of that sort that requires action, then perhaps a declaration of war is the procedure that should be followed.

But, short of that, it seems to me that the Congress should have the power to do cleanly what it now has the power to do through the use of the funding process. That power actually exists in either House today because if one House steadfastly refuses to vote funds for a certain purpose, those funds are not voted.

STATUS OF DECLARATIONS OF WAR

Mr. ZABLOCKI. As our colleague well knows, in the hearing last year we were repeatedly advised that a declaration of war is something of the past, that there are situations where it is either impractical because of certain conditions that the declaration entails. Would you nevertheless urge that there be a declaration of war regardless of the size of the confrontation?

Mr. BINGHAM. I think we have to accept the fact that declarations of war seem to have gone out of fashion, but this presents us with an obligation or responsibility as legislators to try to bring up to date what the Founding Fathers thought they were doing when they put the power to declare war in the hands of the Congress and the Constitution.

At that time, if the declaration of war had not been customary, I think the Constitution might very well have provided some safeguard against a President committing the United States to war without the consent of the Congress. This is a very grave problem indeed.

I am not wedded to any of this language, but I think we should try to come up with some language, some provision, that preserves in the Congress the power over hostilities, the power over the question of whether this country should be engaged in hostilities, that it had under the Constitution as far as the declaration of war is concerned.

RESOLUTION WOULD AFFECT VIETNAM WAR

Mr. ZABLOCKI. Your draft resolution makes no specific reference to hostilities now in progress. If enacted, would it be possible for Congress to vote a "resolution of disapproval" on the Vietnam war?

Mr. BINGHAM. It certainly would; yes, sir.

Mr. ZABLOCKI. Then, is this another version of H.R. 4100, the disengagement act?

Mr. BINGHAM. I think it would give the Congress the power to pass by one House something of that sort. As I said earlier, I think at this stage of the game, and I repeat this, there is not a majority in either House ready to call a halt to the Vietnam war.

Mr. ZABLOCKI. Do you not believe that H.R. 4100 should have a hearing because of its far-reaching provisions?

Mr. BINGHAM. I do.

I am urging such a hearing now; yes, sir. We have no procedure for bringing it to the floor otherwise. If I thought that it could be brought to the floor——

Mr. ZABLOCKI. I would like to join you in that score. I think any proposal as far reaching as H.R. 4100 should have hearings and so should a resolution disapproving of a conflict, because I think Congress sometimes acts too speedily and emotionally. As my colleague from Illinois has stated, we sometimes vote with our hearts rather than our minds. This does not add to the security of our country.

I have no further questions, but I just wanted to get that on the record.

Mr. BINGHAM. Thank you, Mr. Chairman.

INTRODUCTION OF CONGRESSMAN HORTON

Mr. ZABLOCKI. Our next witness is the Honorable Frank Horton of New York. Congressman Horton is the author of H.R. 7290, a bill to restore to Congress its constitutional responsibilities in decisions to send American troops into hostilities.

Because that bill would establish a joint committee on national security, it has been referred to the House Rules Committee rather than to the House Foreign Affairs Committee.

Because of his interest in the war powers issue, however, Congressman Horton has asked to testify here, and we are happy to have his views on this subject.

Mr. Horton, you may proceed with your statement.

STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HORTON. Thank you, Mr. Chairman.

Mr. Chairman, and members of this distinguished subcommittee, I am honored to have the opportunity to testify before you on a subject which may have more potential than any other single legislative action for healing the divisiveness and the diminished credibility our Nation has suffered over foreign policies of the 1960's. I am particularly grateful to be here since, as you realize, my bill has been referred to the Committee on Rules because it provides for creation of a new joint committee. However, I feel that a major portion of my proposal, dealing with congressional war powers, is appropriately under your subcommittee's purview, Mr. Chairman.

The challenge to the 92d Congress to take responsible action in the arena of Presidential and congressional war powers is, to me, the most serious foreign policy challenge we face.

I come here as one Congressman who, like all the rest of us, has felt the pressure, the temptation and the frustration of being asked by large segments of the public to call signals during an ongoing war from the sidelines, participating in what, at best, have been backhanded and ineffective legislative efforts to bring some congressional influence to bear on the era of national tragedy and distrust which has evolved since the passage of the Gulf of Tonkin resolution 7 years ago.

I cite the Tonkin Gulf resolution as a starting point of this era because that event, inadvertently or not, led to an abandonment by the Congress of any proper exercise of constitutional responsibility we

would or should have had in determining the course of America's march into the quicksand of Southeast Asia.

I see the point of this whole issue as being whether Congress, or Congressmen and Senators individually, want to forsake the luxury of sideline criticism of foreign policy and Monday-morning quarterbacking and take on a role which I see as being dictated by the Constitution, a role which would forge a partnership in responsibility with the Executive over the commitment of U.S. troops abroad.

A former Under Secretary of State who served during the Vietnam era said he seriously doubted Congress would prefer responsibility to Monday-morning signal-calling—at the same time he said that the passage of the Tonkin Gulf resolution was "one of the most unhappy things from the point of view of the President," because it precluded his having to return to Congress to win a continuing mandate on the war.

DUTY OF CONGRESS UNDER CONSTITUTION

While former Under Secretary Katzenbach may be correct in his assessment that at least some Members and Senators would prefer the politically safer course of criticizing military actions which are solely a result of Presidential orders, I don't believe the safety of our political skins is a justifiable factor in considering this legislation. As I see it, and as Senators Javits, Eagleton, and others who have introduced war power bills have seen it, we in Congress have a duty, a responsibility, like it or not, under the Constitution to play a major role in any decision to involve American troops in hostilities. Congress, in effect, abandoned this responsibility in 1964 when it accepted President Johnson's determination to retaliate against the North Vietnamese by enacting the Gulf of Tonkin resolution. The power gap we created was quickly filled, and has been filled to this day by exclusively Presidential decisions as to the extent of our commitment of troops to hostilities in the nations of Indochina.

House Joint Resolution 1, which passed the House last year, marked the first effort by the Congress to regain its constitutional role in decisions of war and peace. It is a significant initiative because, at least by implication, it encourages Presidents to consult with the Congress prior to taking military actions. I supported House Joint Resolution 1 in the 91st Congress and would support it again if it proves impossible to get any stronger or more specific legislation through the 92d Congress.

BILL AUGMENTS HOUSE JOINT RESOLUTION 1

The bill I have introduced augments the language of House Joint Resolution 1 in two important ways. First, H.R. 7290 more clearly specifies what course of action the Congress may take if it does not concur with the President's action and his reasons for it. Second, H.R. 7290 establishes a specific procedure for Executive consultation with the Congress which I think is sorely needed.

While House Joint Resolution 1 might encourage such consultation through a sense-of-Congress resolution, H.R. would require it.

The one test which all the war powers bills must pass is whether they change the balance of power between the President and the Congress as defined in the Constitution. House Joint Resolution 1 certainly passes this test and I must commend you, Mr. Chairman, for the great care you have given to not limiting the President's legitimate powers

as Chief Executive and Commander in Chief. However, I also want to emphasize at this point that H.R. 7290 takes equal care to maintain the delicate balance of constitutional power between Congress and the President while dealing more specifically with the makeup of this balance, with the elements of this balance which are meaningful in the context of the world situation in the 1970's. My bill seeks, generally, to define those instances in this modern age, and within the meaning of the Constitution, where the President is empowered to commit U.S. forces to hostilities with neither prior consultation with, nor prior authorization by, the Congress.

The major thrust of my testimony this afternoon is to bring to your attention my bill which gives to the actual mechanics of the exercise of congressional responsibility in warmaking decisions, and of the process of consultation between Congress and the President.

TRUST ERODED BETWEEN PRESIDENT AND CONGRESS

I am one who believes that while the powers assigned to Congress under article I, section 8, are intended to provide a thorough and workable system of checks by Congress over Presidential authority, the actual exercise of these powers does not require the Congress and the President to pair off in an adversary role whenever a decision involving national security is called for. Over the nearly 200 years of our history, our foreign policy has been more successful when Congress and the President have acted in an atmosphere of trust and partnership, rather than in one of distrust and sniping over foreign policy issues. To a major extent, Presidential decisions during the Vietnam era, and the failure of Congress to affirmatively carry out its duties in this period, have eroded that desirable atmosphere of trust and partnership.

I feel that any legislation we adopt must be drafted with an eye to reestablishing, in the long run, a working partnership between the executive and legislative branches where war decisions are concerned.

Thus, in H.R. 7290, I have sought to establish a procedure whereby, psychologically as well as substantively, the fostering of such a partnership would be encouraged.

JOINT COMMITTEE ON NATIONAL SECURITY

Title II of my bill would create a Joint Committee on National Security of the Congress.

The Joint Committee on National Security would bring together authoritative Members of Congress in foreign and military affairs. Its membership would include the majority and minority leaders of both Houses and the chairman and ranking minority members of congressional committees concerned directly with foreign and military policy. The president of the Senate, the Speaker of the House, and the minority leaders in the House and Senate would each appoint one additional member. A detailed listing of the joint committee's membership is contained in the appendix.

I ask that it be included with this statement. (See pp. 24–25.)

This new committee would be designated by Congress as the panel authorized to consult with the President and his national security advisers in situations where congressional powers are involved and where congressional ratification of military actions is required by H.R. 7290.

I cannot overemphasize, Mr. Chairman, that the need for this joint committee does not arise from any demonstrated inadequacy or ineffectiveness of the existing legislative committees of the House and Senate which have responsibility for foreign and military affairs. It is precisely the importance of these committees and the role they would play in the actual carrying out of congressional powers under my bill which prompted me to assemble the leadership of these committees, together with the leadership of both parties in the House and Senate on a single panel—a panel which would be officially and formally designated by the Congress to receive Presidential communications required under this legislation, and to be available to consult privately with the President or his national security advisers in international emergencies.

JOINT COMMITTEE: NO LEGISLATIVE POWER

You will note, Mr. Chairman, that my bill assigns absolutely no legislative power or jurisdiction to the Joint Committee on National Security. Any legislative measures short of or including a declaration of war must first be considered and reported out by the appropriate committees of the House and Senate.

The prestigious and bipartisan nature of the joint committee's membership would, I feel, help to set the stage for an atmosphere of partnership and unity surrounding emergency military decisions, without risking a reluctant rubber stamp of Presidential actions in situations where the Congress does not feel his decisions are in the national interest.

I have also included in H.R. 7290, a provision requiring the joint committee to transmit the President's report on his actions to the appropriate committees of the House and Senate together with a recommendation for congressional action. Far from impeding the legislative process which is to take place within the 30-day period following a military action under the President's emergency powers, I feel that a prompt and authoritative recommendation from this prestigious panel would fulfill a great psychological need for the Congress and the Nation during what would inevitably be a moment of crisis and uncertainty.

JOINT COMMITTEE WOULD ENCOURAGE PARTNERSHIP

In short, I feel the establishment of a Joint Committee on National Security would acknowledge the roles of both the Senate and House in the exercise of legislative powers delineated under the Constitution. More importantly, I feel it would encourage the creation of a working partnership between the Congress and the Executive in moments of international crisis. I do not feel that the joint committee would be an impediment to prompt action or mere excess baggage because of its lack of legislative jurisdiction, but think its very existence would enhance the role of Congress in decisions whether or not to dispatch U.S. troops into hostile action.

NO "SERVICE MANUAL" FOR CRISES

There is one general point in support of the language of H.R. 7290 that I would like to make. I do not feel that the legislation we enact should be an attempt to write an exhaustive "service manual" for na-

tional emergencies. We cannot possibly predict every sort of eventuality, and then seek to describe in detail the roles of Congress and the President in each possible occurrence. Whatever the language of the bill we enact, its effectiveness will depend to a great extent on an atmosphere of trust between the two branches of Government. Without this atmosphere, Presidents will tend to opt for their interpretations of foreign policy history and constitutional provisions in justifying their actions, and Congress could again largely be left with the role of Monday-morning quarterback.

I feel that the language of my bill is firm enough to define the proper war power roles of the Congress and the Executive, without succumbing to the serious charge that the bill ties the President's hands, or seeks to limit his legitimate powers.

There is no question that legislation is needed to apply the meaning of legislative war powers in article I, section 8 to the present-day world of rapid communications, instantaneous weapons or war, and American leadership of the free world. A bill is needed which accomplishes this without hamstringing legitimate Presidential powers to respond to emergency situations. I strongly feel that the provisions of my bill meet this standard.

Also, I feel that my proposal for a Joint Committee on National Security, while it would not substantively change the balance of war powers between the White House and Capitol Hill, would add to the stature of the legitimate role of Congress, and would encourage an atmosphere of partnership and trust in the functioning of both branches of Government in an emergency.

SECRETARY ROGERS BACKS JOINT COMMITTEE

In his testimony on May 14 before the Senate Foreign Relations Committee hearings on war powers legislation, Secretary of State William Rogers emphasized repeatedly the need to improve the mechanics, the scope and the frequency of consultation between the President and the Congress on military and foreign policy issues. The tone of his remarks were such that the news media reported the Secretary had endorsed the formation of a joint congressional committee to facilitate this improved consultation.

Congress is not the Commander in Chief, nor is it an adjunct of the military structure. Congress, as spokesman for the people, has an independent responsibility involving questioning, evaluation, and judgment.

My bill is addressed to the fulfillment of this responsibility, and I hope that my testimony here this afternoon will be a constructive addition to the commendable attention your subcommittee is already giving to this subject.

(The document referred to follows:)

MEMBERSHIP OF THE PROPOSED JOINT COMMITTEE ON NATIONAL SECURITY

Chairman: The Speaker of the House.
Vice-Chairman: The President pro tempore of the Senate.
Members:
The Majority Leader of the House.
The Majority Leader of the Senate.
The Minority Leader of the House.
The Minority Leader of the Senate.
The Chairman and ranking minority member of each of the following

Committees:
Senate Foreign Relations Committee.
Senate Armed Services Committee.
Senate Judiciary Committee.
House Foreign Affairs Committee.
House Armed Services Committee.
House Judiciary Committee.
Joint Committee on Atomic Energy.
One Member of the House who is not a member of any of the aforementioned Committees to be appointed by the Speaker of the House.
One Member of the Senate who is not a member of any of the aforementioned Committees to be appointed by the President pro tempore of the Senate.
One Member of the House who is not a member of any of the aforementioned Committees to be appointed by the Minority Leader of the House.
One Member of the Senate who is not a member of any of the aforementioned Committees to be appointed by the Minority Leader of the Senate.

REPORTING REQUIREMENT OF PROPOSAL

Mr. ZABLOCKI. Thank you, Mr. Horton.

I can assure you that your testimony has indeed been a constructive addition. Your proposal, of course, is not pending before this subcommittee nor even the full committee, but the House Rules Committee. I think it is one worthy of full consideration, although I might ask some questions in regard——

Mr. HORTON. I do adopt the Javits approach in H.R. 7290, and have used basically the same definition of the war powers. I have refined the language somewhat, but the major difference is that I have added the Joint Committee on National Security. The joint committee would operate to give the Congress mechanism for meeting with the President and his national security advisers, so that we have ongoing, continuous consultation.

Mr. ZABLOCKI. Your bill, however, does not specifically provide that the President meet with the joint committee, but only report to it. You have created a legislative history by saying it is your intent that the President would meet with the joint committee and the National Security Council, did you say?

Mr. HORTON. Section 102 says:

In any case in which military hostilities described in section 101 of this title are initiated by the President, the Joint Committee on National Security established under title II of this Act shall be convened, prior to or within twenty-four hours after the initiation of such hostilities, and the President shall report the initiation of such hostilities to the joint committee, together with a full and complete account of the circumstances bearing on the necessity for the initiation of such hostilities.

So he would be required within a matter of 24 hours to report to that joint committee on any action which has been taken.

This committee would be in existence, so it could meet at any time with the President, or with the people designated by the Executive, to be informed of pending military action that might be necessary.

WHO WOULD CONVENE JOINT COMMITTEE?

Mr. ZABLOCKI. To that very point, who would convene the joint committee? You have inferred at least that the President to make his report would meet with that committee.

Mr. HORTON. He would have that responsibility.

Mr. ZABLOCKI. Who would convene the joint committee, the President?

Mr. HORTON. The committee's chairman would convene the committee.

Mr. ZABLOCKI. You do provide that the Speaker of the House would be chairman.

Mr. HORTON. On page 4 of my bill, in line 15:

The Speaker of the House of Representatives shall serve as chairman of the joint committee and the President pro tempore of the Senate shall serve as vice chairman of the joint committee.

Then it also says in section 202:

It shall be the duty of the joint committee to convene at the call of the chairman to receive any report required under title I of this Act and to report to those committees of both Houses of the Congress which will consider legislation referred to.

Et cetera.

Mr. ZABLOCKI. You give 24 hours in your bill. Who would have the responsibility of convening the joint committee?

Mr. HORTON. The chairman. My bill names the Speaker of the House as chairman, but I indicated in testimony before the Senate Foreign Relations Committee that I prefer a rotating chairmanship.

Mr. ZABLOCKI. Even though the President is not ready to report?

Mr. HORTON. The President would have a requirement under this act to meet with the committee and, within 24 hours, he would have to report to it.

Mr. ZABLOCKI. This would be something that I am sure the Rules Committee will explore completely.

Mr. HORTON. The idea, Mr. Chairman, is to have a designated, ongoing committee of the Congress that is available to meet with the President and the National Security Council in times of emergency.

Now, for example, if the President wants to brief anybody, it is solely his decision as to who gets an invitation to come to the White House.

It seems to me we ought to have some mechanism to afford the Executive a liaison, as it were, with the Congress.

A BIPARTISAN HEARING BODY

Mr. ZABLOCKI. I agree this would provide a bipartisan hearing body where in past instances only Members of the President's party have been briefed.

Mr. HORTON. If you will look at the list, there are 24 Members of the committee. They represent a good cross-section of all the standing committees appropriately involved with these problems.

Mr. ZABLOCKI. As I have said earlier, I find some merit but I am not ready yet to subscribe to it fully.

I understand my colleague from Illinois must leave. I have another question, but I will call on Mr. Findley.

Mr. FINDLEY. Thank you, Mr. Chairman.

I think Mr. Horton has given us another demonstration in his long series of imaginative proposals in the foreign policy area. I appreciate very much his taking the trouble to come here today to outline his plan.

In fact, the proposal for a continuing consultation between the Congress and some form of the executive branch is very timely.

The committee attempted to take that into account in House Joint Resolution 1 in the language at the top of page 2, the wording "should continue such consultation periodically during such armed conflict."

CONSULTATION ON CAMBODIAN INCURSION

One of the most gratifying examples of liaison between the executive branch and the Congress, in my memory here, was the occasion right after the incursion into Cambodia when the President had on two separate days the Senate and House Committees on Armed Services and Foreign Affairs and Relations in order to talk directly with them about what he had done and what, as he saw it, would lie ahead. To my knowledge, this is the first such event that occurred during the Vietnam war and, unfortunately, it has not been repeated since then.

I think anything we can do to encourage the President to meet with appropriate representation of Congress during any period of sustained conflict is highly desirable. I am not sure we can require it by law because of the separation of powers, the independence of the executive from the legislative, and vice versa, but it certainly should be encouraged and I commend the gentleman for his very excellent statement.

Mr. HORTON. Thank you. I am very much concerned about these war powers. I do appreciate the work of this subcommittee. I know of your deep concern about it, too, Mr. Chairman, and members of your subcommittee. I think it is important for us to define it.

Just before I testified before the Senate Foreign Relations Committee, Senator Goldwater was testifying. In his prepared text, I think he said there were 158 instances in which the United States had been engaged in conflicts and only six or seven of those that had authorization from Congress. This is what has happened. The Executive has really moved in. If the Constitution has any meaning at all, the Congress has an important role to play insofar as the war powers are concerned, but our role has not been properly defined or carried out. We have created a hiatus or a vacuum, and the Executive has moved in to fill it.

Mr. ZABLOCKI. Mr. Bingham?

ESTABLISHING A DATE FOR HOSTILITY BEGINNINGS

Mr. BINGHAM. Thank you, Mr. Chairman.

Mr. Chairman, I have just been advised that the joint resolution that I introduced today is No. 669. I would like to ask unanimous consent that that number be inserted in my testimony at the appropriate place.

Mr. Horton, I would like to ask you a couple of questions about the latter sections of your bill which follow very closely on Senator Javits' proposals and reflect some of the concerns that I have about that.

You speak, for example, of the authority to carry on hostilities under these conditions as not continuing for more than 30 days from the date such hostilities are initiated.

When would you say we initiated hostilities in Vietnam?

Mr. HORTON. Establishing a date when hostilities began could be clear cut or it could not be clear cut, depending on the circumstances. I think in some instances it might have to be a determination by the

Executive or the Congress. If there was an attack such as Pearl Harbor, there would be no question about the date. If there is a landing, there would be no question about the date. However, if it is a case of gradual buildup, of guerrilla activities, and so forth, it might be the date we first committed our forces to actual combat, or when we sustained our first combat casualty.

But I think, in most instances, it could be fairly well defined. I think in the Vietnam situation it could have been fairly well defined.

Mr. BINGHAM. Didn't we have military advisers suffering casualties during the middle 1960's, before the Tonkin Gulf resolution?

Mr. HORTON. That is exactly why we need a clear definition of war powers. The President now feels he can move troops back and forth and commit the Armed Forces of the United States to combat without having to come to Congress.

I think that is the whole thrust of the problem before us. I know the gentleman from New York agrees with me that there is the need for a definition of congressional and Executive powers. As I said earlier, the Congress has just not taken any role in this and has exercised no initiative.

The fact of the matter is that we have almost abrogated our responsibilities under the Constitution. The definition of the Commander in Chief, as I see it, is not to make war but to continue or to carry out the warmaking policies laid down by the Congress. But the Executive has broadened his powers to the point where now he can commit forces and get us engaged in conflicts without the Congress or the people knowing anything about it.

I think it is important for the Congress and the people to know. This, again, is why I think it is essential that we define this relationship between the Congress and the Executive.

POSSIBLE CONFUSION IN "30-DAY" PROVISION

Mr. BINGHAM. I certainly agree in general. All I am trying to point out is, as I indicated in my testimony earlier, there may be some confusion about a 30-day period as to when that 30 days begins.

Let me also point out to you something that troubles me, and I think it follows the Javits proposal.

Under section 204 of your bill you indicate that the authority to continue hostilities may be terminated by joint resolution of the Congress before the expiration of the 30-day period. What about after the expiration of the 30-day period? If the Congress has given the authority, is that authority irreversible?

Mr. HORTON. No, it would not be. The President would be permitted after the 30-day period to continue if he had congressional authorization. I would assume that the authorization would spell out what the terms would be.

It would be one that would require an accounting every year or within a certain period of time, just like we are required to appropriate moneys for the Army, the Navy, the Air Force, et cetera, every year.

I think we would have to come back with further authorization and approval of any such warmaking authorization that the Congress had acted upon.

AUTHORITY PROVIDED BY JAVITS BILL

Mr. BINGHAM. I think that is a very interesting thought and it is one which has passed through my mind applying to the Javits bill, but it is not contained in the Javits bill.

Mr. HORTON. No, it is not spelled out.

Mr. BINGHAM. The Javits bill is one-time authority and that goes indefinitely. There is no requirement that it be reinstated every year or every 6 months.

Mr. HORTON. I am not saying that the Javits bill is perfect, and I realize that you said the same thing with regard to your bill. My proposal for a joint committee is not a perfect idea. It is just to put some of these ideas into the hopper so that the committees can formulate meaningful legislation. The point is that the warmaking powers as they apply to the Congress today are not spelled out very well and they are not carried out at all.

It seems to me they do have to be spelled out and that the Congress does have to reassert its authority in this field. Otherwise, the Constitution is meaningless. The Commander in Chief's authority, in my judgment, does not mean that the Executive can commit our forces ad infinitum whenever the Executive wants. I think that is part of the problem we have with the Vietnam situation.

SEES PROBLEMS IN BINGHAM RESOLUTION

Mr. BINGHAM. I thank the gentleman.

I would just like to ask him with all respect to have a look at the resolution I put in today and see if it does not carry out the intent of his provisions and of the Javits bill in a way that might give rise to less difficulty.

Mr. HORTON. I am sorry I was not here when you read your statement. But my initial interpretation of your resolution is that there is a continuing authorization for the President to act unless the Congress takes some action to disapprove it.

Mr. BINGHAM. Unless one House take action to disapprove it.

Mr. HORTON. I think that the resolution fails to recognize the warmaking authorities that are granted to the Congress. In other words, I think that you are begging the authority granted to the Congress under the Constitution. You are saying to the President, "Go ahead, whenever you declare war, whenever you want to commit our forces, you go ahead and commit them. But if we don't like it, we will step in and disapprove it and you have to pull them all back."

I would rather take an affirmative approach. I would rather say, "These are the only times you can commit our forces unless you have a declaration of war." With a declaration of war, of course, that is different, but we are talking about undeclared war. "If there is not a declaration of war, these are the only times you can commit American forces. You can commit them for 30 days. In that interim, you have to report to us and the Congress will have to take action. We will have a committee of the Congress who will be working with you at all times."

In that way, we will have better liaison and better relations with the Executive in this field, and perhaps we can act better when an emergency situation arises.

As I say, I would prefer to do it on the affirmative rather than "You go ahead and do it no matter what the situation is and if we don't like it we will disapprove it."

Mr. BINGHAM. I appreciate the gentleman's thoughts. Does the gentleman really think that the conditions that are spelled out, one, two, three, four, particularly three and four, are in any way restrictive on what the President can do if he chooses to carry out the——

Mr. HORTON. Are you talking about H.R. 7290?

Mr. BINGHAM. Yes, the condition that he can act to protect the lives of U.S. nationals abroad and force to comply with national commitment resulting from affirmative action and so on.

Mr. HORTON. The point is that if he does commit our forces, the Congress, within 30 days or shorter under section 204, can say get out of there.

DESIRABILITY OF SPECIFYING WAR CONDITIONS

Mr. BINGHAM. Wait just a minute. I am turning to a different subject now, which is the desirability of attempting to specify the conditions under which the President can act in the first instance. Although I had such a list in my bill last year I have come to the conclusion there is no such purpose to be served in trying to provide a list because either you make it so broad to be meaningless or it is unduly restrictive. I think that these conditions actually could be interpreted so as to permit a President to do more or less as he chose and then the later provisions would come into effect. But looking at just the four situations under which you permit the President to act, are you happy with that listing?

Mr. HORTON. Basically, yes, with the idea that those are the situations in which the President could act in the absence of a declaration of war.

It is a very interesting question and I am glad that is being brought up. It has not been brought up so far as I know in the history of our country, and I think it is important for us to spell it out. The point you make is a good one. It is one that we should give consideration to; namely, whether you use a list or whether you don't use a list. I would prefer to list the conditions, as does the Javits bill and my own, rather than say, "You go ahead and do it and we will come in and blow the whistle if we don't like it."

But I certainly respect your view and your approach and I know you have given a lot of thought to it. I think, basically, you and I have the same concerns; namely, to spell out what the war powers are and have some mechanism whereby we are not going to get embroiled in filibusters and definitions, and so forth, and not get any action. That has been the problem we have had to date. That is why the Presidents have moved in, in 158 instances before the Congress could move. I think it is time we updated the Constitution, if you will, and make it more meaningful in the definition of war powers so that we can exercise the responsibility we have under the Constitution.

Mr. BINGHAM. Basically, I do think we are in agreement. It is just a matter of discovering the best technique.

Thank you, Mr. Chairman.

COMMENTS ON HOUSE JOINT RESOLUTION 1

Mr. ZABLOCKI. I have one last question this time on House Joint Resolution 1. At one point you did say that you would prefer to see House Joint Resolution 1 strengthened. Would you very briefly advise the subcommittee about that?

Mr. HORTON. It is a good bill, but I would prefer something more specific and better defined.

I voted for it before, and I would vote for it again.

Mr. ZABLOCKI. The colloquy between you and my colleague from New York surely has indicated what problems we have in detailing specifics.

Mr. HORTON. Right.

VIETNAM NOT AFFECTED BY HORTON BILL

Mr. ZABLOCKI. Let me ask this question as to your bill, H.R. 7290. Title III, section 301, says:

> This act shall not apply to any military hostilities by the Armed Forces of the United States undertaken before the date of enactment of this act.

Then a requirement to reporting to the joint committee on the Vietnam war would not be included?

Mr. HORTON. My bill was purposely designed to eliminate the Vietnam conflict.

Mr. ZABLOCKI. Technically, World War II is not declared ended. Technically, because of our military commitments to NATO, for example, should there be a confrontation, title III would seem to exclude presidential reporting. Am I giving a proper interpretation?

Mr. HORTON. I don't believe so, Mr. Chairman. The NATO situation would be covered under page 2, line 10, section 4. That is one of the instances in which the President could act to comply with a national commitment, resulting from affirmative action taken by the executive and legislative branches of the Government by means of treaty, convention or legislative enactment specifically intended to give effect to such commitment.

The language of title III is just to prohibit any application of this technique to the Vietnam situation.

Mr. ZABLOCKI. I am very happy to have that legislative history on your part because I think title III, section 301, could very well be interpreted to negate the entire purpose of your proposed act.

Let the Rules Committee make that decision.

I want to again thank you, Mr. Horton, for a very excellent statement. We appreciate your comments and your answers to our questions.

Mr. HORTON. Thank you, Mr. Chairman.

INTRODUCTION OF CONGRESSMAN CHAPPELL

Mr. ZABLOCKI. Our final witness of the day is the Honorable Bill Chappell, Jr., of Florida. Congressman Chappell is the author and principal sponsor of House Joint Resolutions 664 and 665, relating to the war powers of Congress.

Mr. Chappell, we look forward to having your thoughts on this most important subject. You may proceed.

STATEMENT OF HON. BILL CHAPPELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. CHAPPELL. Mr. Chairman, let me thank you and your subcommittee for excellent work in this area.

Let me express my appreciation, too, for the very excellent bills which many of you have already introduced, and specifically the one which you passed last time in the House and which is again under consideration in this subcommittee.

If I might, Mr. Chairman, since the hour is late, and I know you would like to move on, if I might have your authorization to have my statement received in the record in toto, then I will just start with a summation, and perhaps we can proceed more rapidly that way.

Mr. ZABLOCKI. Without objection, it is so ordered.

(The prepared statement of Mr. Chappell follows:)

STATEMENT OF THE HONORABLE BILL CHAPPELL, MEMBER OF U.S. CONGRESS, FOURTH DISTRICT OF FLORIDA, IN FAVOR OF HOUSE JOINT RESOLUTIONS 664 AND 665, JUNE 1, 1971

Mr. Chairman, I wish to thank you and the other committee members for this opportunity to discuss measures intended to better define the respective powers of the Congress and the President in the exercise of the warmaking power.

Just last week, some 49 members joined me in introducing House Joint Resolutions 664 and 665. This measure is designed to strengthen and specify action with which both the President and the Congress must comply when American troops are committed to battle outside the United States.

We wish to commend those other persons who have introduced similar measures designed for the purposes of again having the Congress fulfill its constitutional responsibility with regard to our Nation's involvement in war. Your reasoning in House Joint Resolution 1 is incorporated in the measures which we have introduced. We respectfully ask your consideration of these bills in your deliberation on this subject as additional suggestions as to how the problem of prolonged involvement might be solved.

First, I believe we all agree that some congressional definition needs now to be made. Our Nation totters on the brink of despair in its efforts to understand America's involvement on another soil 10,000 miles away in a war we have never chosen to win.

Our youth are frustrated from battle stagnation and too often have turned to the fantasy of drugs. Thousands of mothers have cried in despair at the burial of their sons, lost to battles they were not permitted to win. Rebellion has sounded in the mass patters of feet attuned to the divisive mechanics of our international enemy.

LETTERS SHOW SCARS OF WAR

This problem plagues the citizens of our Nation daily. Letters pour into my office each day, revealing the anguished scars this war is leaving on our people. Too many young people regard our process with skepticism and our military system has suffered tremendously in both prestige and morale. Our people ache to see this matter settled. Some of our young people resort to radicalism, and our military system has been cheapened as a result of our involvement. Thousands of our comrades live among us as maimed and disfigured reminders of the horrible sacrifices of war. God forbid that history shall ever record those as symbols of a vain and ill-reasoned season of conflict.

Neither praise nor condemnation of actions, past or present, but rather their unforgettable lessons, will avail us to a sensible direction for the future. One such lesson is that no government dare commit its people to prolonged armed conflict without a clear definition of the purpose of such commitment and the will of the people to pursue them to victory. How, then, do we implement the lesson? We best do so by clearly defining the respective responsibilities of the President and the Congress with reference to the constitutional power to make war. The proposed resolution before us, I believe, is a reasonable approach to such implementation.

NO EFFECT ON PRESIDENT'S REPELLING ATTACK

This resolution in no way alters the President's power to initially engage our forces to repel a sudden attack or to protect American lives and property. It simply requires the President, within 72 hours of committing any of our Armed Forces to action in any armed conflict outside the United States, to report such committment to the Congress. If the Congress shall fail to approve or otherwise act on such report, within 30 calendar days after receiving it, the President shall within the next succeeding 30 days terminate such commitment and disengage all forces so committed.

This proposal embraces the intent of the framers of the Constitution and the thoughtful declaration of many great Americans after them.

Article I, section 2, of the Constitution states that the Congress shall have the power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the Government and regulation of the Armed Forces, to provide for calling forth the militia, to execute laws, suppress insurrections and repeal invasions, to provide for organizing an army and disciplining the militia and to make all laws necessary and proper for executing the foregoing powers, Article II, section 2, of the Constitution states that the President shall be commander in chief of the army and navy.

INTENTION OF CONSTITUTION FRAMERS

The framers of the Constitution were very deliberate in balancing the powers of this Government and those of the Congress and President, and they were deliberate for excellent reasons. All too frequently the American colonies were drawn by the King's decree into England's wars. The leaders of the newly independent republic resolved to make certain that their new country would never again be drawn into war at the direction and discretion of a single man. For this reason, it transferred the war power to the legislative branch of the newly created government.

Indeed, the framers of the constitution recognized that the President, under certain circumstances, might have to take defensive action to repel and subdue a sudden attack upon this great Nation. But that was the extent of the war making power they were willing for him to exercise. The intent of the framers is made quite clear in the proceedings of the Constitutional Convention and in the subsequent writings of our Founding Fathers. Thomas Jefferson, in a letter to James Madison, back in 1789 said:

"We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the executive to the legislative body, from those who are to spend to those who are to pay."

Pursuing this same line of thinking, Alexander Hamilton, who generally favored extensive presidential power, nonetheless wrote:

"The President is to be Commander in Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy, while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the constitution under consideration, would appertain to the legislature."

When, in 1846, President James Polk sent American soldiers into the controversial territory of Texas, marking the beginning of the Mexican war, Abraham Lincoln was just a young man in the House of Representatives in the State of Illinois. Lincoln felt that the President had acted unconstitutionally, and he said:

". . . allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose . . .

CONSTITUTION IS A LIVING DOCUMENT

I deeply believe that the Constitution is a living document. The Congress of the United States must activate its responsibilities under this document for determining war and peace. Although I have been a Member of this distinguished body for a very short time, I have for ten long years watched the shadow of

a war creep over the mood of this land. I feel most profoundly that had Congress either declared or refused to allow our involvement in Vietnam at its outset, a clear-cut attitude would have been established and the national hurt of our people avoided.

The United States is the leader of the free world today. But this is not so because our citizens are anxious that we take the lead in military battles; nor because our diplomats are the most expert; nor because our policies are faultless or the most popular. The mantle of leadership has been placed upon our shoulders not by any nation, nor by our own Government or citizens, but by destiny and circumstance—by the sheer fact of our physical and economic strength, and by our role as the only real counter to the forces of communism in the world today. If events in Indochina have taught us to better fulfill that role, then it is not a wholly dark story. And I want to emphasize that this resolution affects in no way our present involvement, but that the mistakes of the past must be heeded in the future.

Mr. Chairman, we in the Congress have the power to assure the American people that never again will we allow a situation like Vietnam to occur. Let us play the part our forefathers intended in the delicate exercise of the war making power. Let us clearly define the respective responsibilities of the President and the Congress in the exercise of it. I urge a favorable report of your committee on H.J. Res. 664 and 665.

Mr. Chairman, thank you again for allowing us to appear. We commend you and the Members for the work you have put into this matter and want you to know that we will work with you in every way possible in the measure your committee reports.

STATEMENTS BY FOUNDING FATHERS

Mr. CHAPPELL. By way of summation, I would like to call the subcommittee's specific attention to page 3 at which I have discussed briefly the constitutional provisions which I think are embodied in the work that all of us are planning to do in this field and also to pages 4 and 5 where I have referred specifically to what I believe to be the intent of the Founding Fathers on the constitutional provisions touching the war powers.

I would like to mention specifically the statement made by Thomas Jefferson in a letter in 1789 to James Madison, where he says—

> We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

Then the words of Alexander Hamilton when he was pursuing the same line of thinking, when he said—

> The President is to be commander in chief of the Army and Navy of the United States. In this respect his authority would be normally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the Military and Naval Forces, as First General and Admiral of the Confederacy, while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the Legislature.

And then, third, the words of Lincoln, who in 1846, referring to James Polk and his experience in the commencement of the Mexican War, he said—

> . . . allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion; and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after you have given him so much as you propose . . .

Mr. Chairman, I have referred to that only to place in the record, I think, some of the basic thinking of those who were instrumental in

framing the wording of the constitutional provisions relating to the warmaking powers.

PROLONGED WAR IN VIETNAM: CONFOUNDING

I believe it is the prolonged war situation which bothers all of us. I think all of us recognize that the President has to have a free hand in order that he can protect us in the case of a sudden emergency or to protect our people overseas or our property. I think none of us are concerned about his immediate exercise of his powers under the Constitution to do that.

I do think it is the prolonged war which confounds all of us and we don't know just exactly where to place the limit. I speak specifically with reference to House Joint Resolution 664 and House Joint Resolution 665 which I, together with some 49 other cointroducers, introduced last week. It is the simple intent and purpose here, Mr. Chairman, to supplement very much the fine thoughts which the chairman and those who cointroduced his bill with him and to take just perhaps another step to say what does happen in the event the Congress does not act.

INACTION OF CONGRESS HAS CAUSED DIFFICULTY

It has been the inaction, I believe, of the Congress which has again caused so much of our difficulty. It has been fearful, it appears, of getting in at the time when we should get in in order that we might define our part and procedure in that which might amount to a prolonged war. The resolutions about which I speak specifically simply provide that except in the case of a declaration of war by the Congress or the declaration of an emergency by the Congress that the President if he engages, actually engages our troops outside of the United States in hostile conflict, he, within 72 hours, must report that fact to the Congress, giving his reasons for it and the expected duration of the conflict or the engagement and then if the Congress does not within 30 days thereafter act to approve or otherwise instruct the President, then he shall have an additional 30 days within which to disengage those forces.

I don't know whether the 30-day period, as has been suggested here earlier, is the right time or not. Perhaps it should be 60 or 90 in each instance.

All we are attempting to do through this resolution is define that period of time within which the Congress should act to approve an engagement of war by the President, failing which the President shall disengage all forces so committed.

I do want to emphasize the point that none of us intend to hamper the President in the exercise of his emergency powers.

There is nothing in this provision that attempts to take away from the President any of his powers, but, rather, to bring the Congress properly into focus in the presentation of its responsibilities. So I believe this approach, though certainly not perfect, is a good approach, a reasonable approach and one which would eliminate in the future our engagement without an intent to win by our forces in combat under circumstances such as Vietnam.

Mr. Chairman, I thank you and thank your wonderful subcommittee for the opportunity to present my thoughts to you. Knowing your

work so well, I think that whatever you bring from this subcommittee will be something I can support on the floor as I supported you the last time.

QUESTIONS DETAILS OF CHAPPELL BILL

Mr. ZABLOCKI. Thank you, Mr. Chappell, for your excellent statement. Also amplifying on the language contained in your Resolutions 664 and 665, frankly, on page 2, lines 6, 7, 8 and 9, I have some concern because you say, "shall report in detail to Congress his reasons for his evaluation with respect to the effect and duration of." In your further explanation you said "expected duration."

Mr. CHAPPELL. Mr. Chairman, again, I am not wed to that particular language.

Mr. ZABLOCKI. I have trouble with the word "detailed," to have a detailed report on and how long a confrontation would last. I think no President could indeed fulfill that part of the law if it did become law. What I do have a real problem with is that "if Congress within 30 calendar days after receiving such report shall not by concurrent resolution or otherwise act on said report, such commitment shall be immediately terminated." What about filibusters?

ANTI-FILIBUSTER PROCEDURES

Mr. CHAPPELL. As I say, it may be that some of the thoughts others have had with reference to filibuster might better perfect the bill. I believe, as was stated here earlier, that the Congress, within its own range, has a way of solving those problems, especially with a subject so intense as the Vietnam situation. I think that a longer period of time might be better for congressional action, or a procedure to overcome a filibuster. I think this is a valid consideration and much thought, I think, needs to be given to it.

I personally believe that if we set a period, whether it is 30, 60 or 90 days, I believe if we put that period in there, if the President of the United States with all of his influence and that of those who work in his administration and the military officials which guard our country and those in the Congress who are interested in taking a particular step, if they are not all together strong enough to overcome such a problem as filibuster then I think we have very serious problems anyway—and perhaps it is the kind of prolonged conflict we ought not to be engaged in.

Then, of course, the President has the opportunity of a total of 63 days in such an emergency engagement under this bill.

I would like to comment on the thought the chairman mentioned about reporting in detail. The intent and purpose with that language is to simply have him give sufficient information on which the Congress might be alerted to take action. Now, with reference to the duration, the bill simply provides, "and his evaluation with respect to the effect and duration." Now, that is only his evaluation. It does not say he has to tell us it is going to last exactly 6 months, a year, or 10 days, but to give his evaluation as to what might be expected. The thinking behind that, Mr. Chairman, is that the Congress might take one action if it be convinced the engagement will be a quick conflict; and another if it be convinced that a prolonged conflict might ensue.

CHAPPELL BILL: NO VIETNAM APPLICATION

Mr. ZABLOCKI. I also notice that your resolution does not apply to the armed conflicts in which the Armed Forces of the United States are engaged today.

Mr. CHAPPELL. That is right. It is not intended to solve the problems that already exist with reference to Vietnam. I believe we are in the process of disengagement there of one sort or another. I think here we should take the lessons we have learned and try to put those lessons into a way of having the Congress better act in the event we come into a situation like that again.

Mr. ZABLOCKI. Thank you very much.

Mr. Bingham?

NOTES CO-SPONSORSHIP OF CHAPPELL BILL

Mr. BINGHAM. Thank you, Mr. Chairman.

Mr. Chappell, I certainly would like to commend you for your statement. I am particularly interested in those quotations you brought before the subcommittee, I think they are most apt indeed, from the Founding Fathers and from President Lincoln when he was a Congressman. It is interesting that Hamilton who was considered an advocate of strong presidential power made it clear that he did not intend to have the President have the power to carry on war without the approval of the Congress. I am very much impressed with your resolution.

I am particularly impressed with the remarkable cosponsorship that you have attracted. You have a most representative group of cosponsors representing all wings of thought in the House, and I think it is a remarkable achievement.

Mr. CHAPPELL. Thank you, sir.

PROBLEMS OF SETTING 30-DAY LIMITS

Mr. BINGHAM. I don't know if you heard my testimony earlier and I don't want to dwell on the points, but I do have reservations about forcing the Congress to act on this matter within a certain specified length of time. I think unless you have some provision to protect against a filibuster, no matter what time limit you set, if you don't have some provision against that, you would permit two or three Members in the other body to prevent the Congress from acting and require the termination of the hostilities whether or not that was the will of majority of the Congress. The danger there is that a few Members, a very small minority perhaps, could paralyze the action that the country might want to take and that the majority of the Congress might want to take.

Your 30 days are much more measurable than the 30 days in the Javits proposal because you have set it as 30 days from the time the report is submitted. The difficulty that strikes me there is what happens if the President simply does not submit the report and just goes ahead without submitting the report? What then?

Mr. CHAPPELL. Of course we are in the same kind of category we find ourselves in when he does not take on something else where he is constitutionally or otherwise required to. This type of requirement,

I think, would subject the President to impeachment in the event the Congress felt strongly enough about it.

I have no objection to an amendment which says that "within so many days after the engagement * * *." I think we could say in the event he failed to do so. Within that prescribed time, then, it shall date from the time of the actual date of the conflict or the engagement of our forces in conflict. I think that would remedy the problem, Mr. Bingham. It should be considered a real serious one.

DESIRABILITY OF PERIODICALLY RENEWING WAR AUTHORITY

Mr. BINGHAM. What would you say as to the desirability of having some sort of requirement that this authority be renewed every so often, as Mr. Horton suggested earlier? In other words, are you satisfied that once given, that should be enough, or should it be renewed every year? We have had this Vietnam thing going on now for 6 years.

Mr. CHAPPELL. Mr. Bingham, this sort of thing gives me concern as it does most of us. On the other hand, if we could get the Congress alerted to assuming its responsibilities, that which it giveth it can take away and that which it authorizes it can reverse, then it seems to me that if the Congress found in any given time that this conflict had gone on long enough, the Congress could stop it. There is no reason why it couldn't. There is nothing that would prohibit it from stopping it here. There is simply the requirement that it be reviewed every so often.

Another thing that concerned me about the Vietnam situation is that the President was given almost a blank check to do all of those things he deemed necessary in that area of the world. I think this is the thing that maybe the resolution, if you could find the proper wording, should tie down so that we don't just give cart blanche authority to one man, and I think that is what our Founding Fathers were concerned about, that we might vest it in one person, this power to make war. So, they were trying to prohibit it.

Again, I don't know how this Congress can tell the next one exactly what it must do. So somewhere along the line we have to assume that both the President and the Congress will be responsible and act responsibly under these circumstances.

This is simply a device, as I see it, to get Congress to do that which it should already have done and should already be doing with reference to the warmaking power.

WISDOM OF "ONE HOUSE VETO" PROPOSAL

Mr. BINGHAM. One more question. On the continuation of this authority, may I point this out to you, that under your procedure both Houses would have to concur in the authority granted, but once that authority has been granted it could be repealed only by action of both Houses. In other words, if one House after the end of 2 years decided it had enough and didn't want the President to carry on, nevertheless that House could not act to impede the President. In a way, one House alone could not act to repeal the authority granted by both Houses.

Mr. CHAPPELL. Mr. Bingham, I believe that both Houses should be required to act. As a matter of fact, one of the weaknesses I see in the present Constitution is that with reference to the treatymaking power we have left that authority conferred in only one body. I think

that has gotten us into lots of difficulties. I think there is an area for real study.

I think that if both bodies of the Congress were required to affirm or confirm the commitments we make under the treatymaking power many of our problems might be averted. Certainly, we could, today, put in a specific exception in a bill of this sort and say "excepting treaties made under the Constitution" that these things would happen.

I think we would have a much better way of doing things, but all of us recognize that is a long way, the long way around, too.

WAR AUTHORITY REQUIRE TWO-HOUSE APPROVAL?

Mr. BINGHAM. Following that very line of thinking, wouldn't you say that the President's power to carry on hostilities without a declaration of war is such an extraordinary power that he should not be in a position to exercise it unless he has the continuing approval of both Houses?

Mr. CHAPPELL. I concur that at any time we find ourselves in a circumstance where the people are so disunited as, for example, now, that there ought to be a good way to trigger the action which would be necessary for disengagement. I personally believe that a device similar to the one before us might have prevented the problems of Vietnam as we know them. Congress would have said one or two things: "Let us get in there and win it, Mr. President, with all that we have, and we are going to make the appropriation," or "Stay out."

First, I don't believe we would have gotten into that circumstance, as we did, one in which we were not going to permit our young people to win. We teach them not to fight unless they have to; but if they are going to fight, get in to win, then we send them into a situation like Vietnam and we won't let them win. It is that kind of attitude, I believe, this sort of law might be very helpful in preventing.

Certainly that is my intent in doing so.

I would like to comment further. Your bill, H.R. 4194, I commend the gentleman on that subsection (b) of section 2. I think with some changes perhaps he is on the right track. I am not sure that the times in there are right. As in my bill, I am not sure the times are right, but I think it is heading in the direction to solve the problems of a filibuster.

Mr. Bingham, I am not sure I was responsive to your last question.

Mr. BINGHAM. On the last point, I did mention earlier that that language, subsection (b), is taken from Senator Javits' bill. I think it was aimed at the filibuster problem.

I appreciate your comments. Certainly I fully agree with the general thrust and purpose of your resolution.

Mr. CHAPPELL. Thank you, sir.

PERIODIC RENEWAL OF TREATIES

Mr. ZABLOCKI. Again, I want to commend you for appearing before the subcommittee. You certainly have contributed to a better understanding of the problem we are grappling with. I think your resolution has merit. I want to second your comment that the House of Representatives should have the right to approve treaties, since it has to carry out the obligations of treaties.

We discussed last year whether treaties ought not to have a termination date of 10 years, 15 years, or 20 years, and be reviewed periodically, since the world situation changes from time to time. Would you care to comment?

Mr. CHAPPELL. Mr. Chairman, I think definitely they ought to. I think the provision, which I understand is written in most of them, that the treaties are subject to constitutional action or determination on the part of Congress leaves an out. In other words, I think it really leaves us in a position where perhaps if the two bodies, if the matter did come back even by reporting process such as this where an engagement of troops actually took place because of a treaty arrangement, that again this would be one way of reviewing those. I do believe that right now the Congress would have an opportunity to, in essence, abrogate if they wanted to do it; but I certainly would not advocate it because I think where we have committed this Nation by way of agreement, we must stick to it. I think we must always honor our word and our commitment.

I do think the point is well made, and that those treaties either ought to be reviewed periodically or we ought to make them for a lesser period or ought to have the concurrence of both Houses.

ADJOURNMENT

Mr. ZABLOCKI. Thank you, again, Mr. Chappell.

The subcommittee will meet again tomorrow in this room at 2 p.m., to continue hearings on war powers bills and resolutions.

The subcommittee is adjourned.

(Whereupon, at 4:15 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Wednesday, June 2, 1971.)

WAR POWERS LEGISLATION

WEDNESDAY, JUNE 2, 1971

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2172, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. ZABLOCKI. Today we are continuing the hearings of the Subcommittee on National Security Policy and Scientific Developments on pending bills and resolutions which would affect the war powers of Congress and the President.

INTRODUCTION OF CONGRESSMAN SISK

Our first witness this afternoon is Hon. B. F. Sisk of California. Mr. Sisk is the author of H.R. 8446, to define the authority of the President of the United States to intervene abroad or to make war without the express consent of the Congress.

Mr. Sisk is a distinguished Member of Congress and it is a pleasure for me to welcome him before this subcommittee.

Following his presentation, the subcommittee will hear from representatives of the executive branch.

We welcome you warmly and look forward to your testimony, Mr. Sisk. You may proceed with your statement.

STATEMENT OF HON. B. F. SISK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. SISK. Thank you very much, Mr. Chairman. I will not infringe on the time of the subcommittee.

Mr. Chairman and members of the subcommittee, Congress is increasingly being informed after the fact or coerced into approving executive war actions under the duress of events.

This happened in Vietnam even when it was not necessary for military maneuvers. I think all of us are willing to allow the greatest latitude in military operations when it will help the success of a campaign.

Recent actions have called into question our acquiescence in this matter.

The Tonkin Gulf resolution to some extent led to the massive military intervention into South Vietnam. We were informed that drastic

U.S. military intervention was necessary to prevent the cutting in two of South Vietnam.

There is no reason to disbelieve this would have taken place. But this opened the door to a Pandora's box of subsequent actions in augmentation of U.S. Armed Forces which still has Members of both Houses of Congress debating their wisdom in voting for the resolution.

Most recently, there was the invasion of Cambodia and Laos.

During the Vietnam war, military actions in surrounding countries were made without consulting Congress. Members of Congress found out about it by reading the morning newspaper.

The risk of the lives of our fighting men, Mr. Chairman, is the concern of all of us, private citizens and public officials alike. This is all the more reason for us to be kept fully informed of administration war plans.

Because in most past wars, the executive branch has acted with commendable restraint or the pressures of defense was so great, this issue has not been so sharply focused as today.

EXPLANATION OF HOUSE RESOLUTION 8446, THE SISK BILL

With this in mind, I have introduced H.R. 8446, which the Subcommittee on National Security Policy and Scientific Developments is considering with other war power legislation today.

H.R. 8446 would define the authority of the President to intervene abroad or to make war without the express consent of the Congress.

The bill would prohibit the President from deploying the Armed Forces of the United States outside the country, except for peaceful purposes, unless specifically authorized by the Congress.

Certain exceptions are made to avoid too stringently restricting the President.

One exception would allow the President to act on the advice and consent of the Senate in connection with treaty matters.

The bill would allow the President to act on his sole discretion in deploying the troops if he found the territory of the United States under attack or under imminent threat of attack or to fulfill a specific treaty obligation of the United States.

In the event of a declaration of war by the Congress, the President could deploy the Armed Forces only in countries specifically named, unless the safety of the American or allied forces were at stake.

Even in this event, the President would be required to notify the Congress 24 hours after any action deploying the Armed Forces and in the event Congress is not in session, to call an extraordinary session within 24 hours.

The same subcommittee, Mr. Chairman, last year found that legislation to restrain executive use of military power is necessary.

As Congressmen, we do not want the Congress to take over the responsibility of the President as Commander in Chief of our Armed Forces.

Neither do we want him to usurp the direction of foreign policy, taxation, and expenditures which are solely vested in Congress.

Mr. Chairman, I urge the subcommittee judicious consideration not only of this bill but other bills which I understand are pending before your committee.

Thank you very much, Mr. Chairman, for this opportunity to make a brief statement.

VIEW OF HOUSE JOINT RESOLUTION 1

Mr. ZABLOCKI. Thank you, Mr. Sisk, for your statement. I know you supported the resolution that was reported by the Foreign Affairs Committee and adopted by the House last Congress.

Mr. SISK. That is right.

Mr. ZABLOCKI. You are familiar with House Joint Resolution 1, which is almost identical, just a bit stronger than the resolution we passed in the last Congress.

Do you feel that this resolution goes far enough or too far?

I ask this question because I know in your bill, H.R. 8446, you call for the President to report but you don't require him to consult Congress or to keep Congress informed during hostilities.

Mr. SISK. Let me say this, Mr. Chairman, with reference to the other resolution.

It is House Joint Resolution 1?

Mr. ZABLOCKI. House Joint Resolution 1, yes.

Mr. SISK. I would find no particular fault with that resolution.

Now, in connection with the powers of the President as Commander in Chief and in the event, of course, of an attack, I think there are times that the President in the best interests of our country is going to have to act quickly.

Here, it was my desire to try to make certain that we do not tie the hands of the President to act in that kind of an emergency.

Of course, if he feels that it is necessary to act, then he immediately may inform the Congress within 24 hours of what he has done.

At a time when we were not in session and in his judgment a very serious and imminent threat did exist, then I would not want to restrain his right to act by the necessity of consulting, where it would be impossible without at least a certain lapse of time.

This is the reason, I guess, that I put the provision in rather than requiring in every case that he consult prior to the action. I would visualize, for example, a situation, like the December 7 attack at Pearl Harbor.

No one, of course, has any desire to restrain or restrict the President and the military in immediate answer to that kind of thing.

But there could be other situations where an attack might be considered to be so imminent as to make it impossible to consult.

That is what I had in mind.

SETTING CRITERIA FOR PRESIDENTIAL ACTION

Mr. ZABLOCKI. We had quite a discussion on the desirability of, and the opposition to, stating and listing the exceptions under which the President could act.

I note you list three criteria as exceptions to the prohibition against employing troops during hositilities outside the United States.

Under these three criteria could the President respond, for example, to an attack on Israel?

Mr. SISK. Here, again, it would depend to some extent on circumstances. I think under certain kinds of circumstances he could.

Now, the general tenor of my resolution would make it impossible for the President to send troops to Israel without approval of the Congress.

Because here is a situation that has certain pending dangers. We recognize the explosiveness of the situation.

Again, I think the area in which the President would be permitted to act would be in the event of a surprise maneuver in the Caribbean, where very suddenly and unexpectedly a situation developed endangering American citizens or American troops. The President might find it necessary to move in quickly to stop that kind of adventure and then consult the Congress within 24 hours and explain the reasons why.

This is where I would want to give him latitude. I question the advisability of making it impossible for him to move quickly.

In the event there was a sudden attack on Guantanamo, certainly I would not wish to restrict his right to go into Cuba or to do whatever is necessary to protect our people, both civilians and military, and then inform the Congress within 24 hours of what he has done.

We have to rely on the President and his integrity to make decisions in times of stress and this is what I am attempting to do—to leave him that decision power.

WHY HOUSE JOINT RESOLUTION 1 SETS NO CRITERIA

Mr. ZABLOCKI. I certainly agree with you on that. That is the specific reason why in House Joint Resolution 1 we did not attempt to set specific conditions under which troops may be committed because there might be a misinterpretation or by our omissions the President would not have a free hand in some future situation.

I wondered how strongly you felt about setting the exceptions in legislation.

Mr. SISK. I leave that up to the subcommittee because I feel sure that members of his subcommittee are far better informed than I am.

As I said, the writing in specific exceptions was an attempt to set specific limitations but leave the President the freedom of option under a particular set of circumstances.

The thing I am concerned about is the situation we have fallen into in the past 20 or 30 years. We have intervened here and there and then found ourselves in a full-scale war without any action of the Congress.

I am not criticizing any President for having done this. But I think it is stretching beyond reason the constitutional powers of the President to commit troops to battle actions in foreign areas without the approval of the Congress.

This is what I want to see stopped. If Congress declares war then both executive and legislative branches are exercising constitutional prerogatives under constitutionally perceived restraints.

It may be that the language in House Joint Resolution 1 would be better. Certainly if the committee reports it I would support House Joint Resolution 1, Mr. Chairman.

Mr. ZABLOCKI. I would like the record to show that the gentleman from California is much too modest. He has been in the forefront in the formulation of legislation in the area of delineating or clarifying the war powers of Congress and the executive branch. I want to commend him for his past efforts.

We look forward to his counsel and advice in this area in the future.

I thank the gentleman.

Mr. SISK. Thank you very much, Mr. Chairman.

Mr. ZABLOCKI. Mr. Findley?

IMPACT OF SISK BILL ON VIETNAM ACTION

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. Sisk, I too appreciate your being here today. I think the fact that you have taken the trouble to prepare a statement, introduce the bill and have taken the time to be here shows your commitment to this issue of the relationship between the executive and the legislative branches, which concerns many Members.

You have in your bill the phrase "for other than peaceful purposes." That is on lines 5 and 6 of the first page. To give you an example, in order to understand more clearly what you mean by this phrase, "for other than peaceful purposes," back in 1963 or thereabouts President Kennedy ordered some 16,000 personnel—military personnel—to Vietnam. They were sent there under the label of military advisers.

Shortly after they arrived they were reorganized and made a part of combat operations. Would the deployment of these 16,000 personnel be an act other than for peaceful purposes within the meaning of the resolution you have introduced?

Mr. SISK. If I can say to my good friend from Illinois, as I understood the action taken at the time by President Kennedy, it would be my opinion that under the intent of my resolution he might reassign those troops to combat roles but within 24 hours, I would expect him to consult with Congress and explain why.

I say this because it was my understanding that this was to be a peacekeeping operation. There was an implied understanding that those troops would be used to restrain and to keep the peace and literally not to make war.

Again, I recognize we are dealing in a gray area. The interpretations placed on that action and the events that developed we know all contributed to the situation we find ourselves in.

Speaking from hindsight, we can say we wish it had not happened, or that he should not have done so without consulting Congress and getting congressional approval.

But using what I understood to be your analogy, I think he could have taken this or similar action or could do so in the future on the basis that these people are there for peaceful purposes.

Here, again, it comes down to interpretation. I recognize there is no absolute black and white way that these things can be interpreted and carried out without question.

Mr. FINDLEY. Let me put it this way: If H.R. 8446 had been law in 1963, would the President have violated this law in the first instance by sending the 16,000 military advisers to Vietnam and in the second instance by deploying them as military advisers.

Mr. SISK. I think he would have been in violation of the law to deploy them for combat purposes, yes. That would be my interpretation.

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Fraser?

ROLE OF CONGRESS IN AUTHORIZING HOSTILITIES

Mr. FRASER. Thank you, Mr. Chairman.

I want to commend my colleague for the interest he has taken in a subject which is difficult to deal with by statute.

In looking at your resolution, I notice that you require a declaration of war by Congress unless a specific treaty obligation is violated or the United States is under attack.

In Vietnam the question arose as to the wisdom of declaring war. It was argued that a declaration of war might trigger some undisclosed treaty commitments between North Vietnam and the Soviet Union or between North Vietnam and mainland China.

U.S. Armed Forces have participated in hostilities, as for example in the Congo, where we contributed certain logistical support elements as part of a United Nations force that was actually engaged in hostilities.

Is it important for Congress to authorize action by the President in the form of a declaration of war or would it be possible to authorize the President to do whatever is proposed to be done or is being done?

Mr. SISK. I appreciate the gentleman's question. If my resolution does not make this clear I would certainly want to make it clear in any resolution that we pass. What I would like to see is acquiescence of Congress before men go into combat.

That is the sum and substance of what I seek to get at. Before men's lives are jeopardized by actual combat except under attack we should exercise our constitutional role. It would be my understanding and certainly my hope that if this resolution is not properly written to do that, then I would want it rewritten so that Congress would be consulted and congressional approval is given for such action.

In a case where we actually sent American troops into combat action either jointly as part of the United Nations or in some other way we would have the authority to delegate that power without declaring war.

I don't mean to say that in every instance a man cannot be involved in combat without a declaration of war. At least there should be congressional approval prior to his being sent into combat.

Now if my resolution is not broad enough to cover that, then I would want it changed to include that kind of coverage. We recognize that we are apt to be faced with many kinds and types of incidents that may transpire in the future different from anything we have had in the past.

Before a man risks his life on the firing line of any foreign country, Congress should approve that action, not necessarily by declaration of war but at least by resolution in support of the President.

POWERS OF CONGRESS TO RESTRAIN PRESIDENTIAL ACTION

Mr. FRASER. One other question. Suppose that the Congress enacted a law prohibiting the President from stationing troops aboard in certain places. Do you believe that the Congress has the authority to restrain the President in that fashion?

Mr. SISK. Of course. It is my understanding that Congress has the power to restrain him even today through the use of the purse string.

I again refer to our national forces in Europe. I do not think there is any question but what the Congress has the power today without any additional law, through the use of appropriation of money, to force the return of our troops.

On the other hand, I would not propose to restrict the right of a President to assign troops to occupation duty because this falls within the area of what I would consider peaceful use.

Mr. FRASER. I understand that your resolution would not get at that particular question. I am really asking this in a more general way. Let us suppose that Congress enacted a troop ceiling of 100,000 men in Western Europe under NATO. In your judgment if we passed such a law do you think that the President would be bound by it?

Mr. SISK. Yes, I do.

Mr. FRASER. So do I. The executive branch is arguing that they cannot be bound by such a law. They will have an opportunity later to state their position clearly.

Mr. SISK. I recognize that we are concerned here with a definition of the constitutional powers of the President as our arbiter in foreign affairs. I hope we are also defining and clarifying his role and ours.

I have tried to lean over backward to avoid constricting or improperly restraining the President as Commander in Chief of our Armed Forces, as well as our principal arbiter in foreign affairs.

However, we are talking about an area where there has never been that occasion or necessity to define the constitutional power which he has. It seems to me that Congress, which raises money, levy men for armed forces by constitutional power, also has the right to approve the number of troops sent into combat.

To me it seems pretty clear. Yet I understand, constitutional lawyers may differ.

Mr. FRASER. Thank you very much for a very useful contribution.

Mr. ZABLOCKI. Mr. Fulton?

DEFINITION OF TERMS IN SISK BILL

Mr. FULTON. I am glad to have you here and I think your responses are helpful to the subcommittee.

As we look your resolution over you use a definition on the first page, lines four and five, "outside the United States or any other territory subject to its jurisdiction."

You are therefore defining two terms. Then you go over on page 2. You transpose that definition under subsection 1, line three. "When he finds that the territory of the United States is under attack or under immediate threat of attack . . . ."

Your resolution is different than some of these other resolutions, that if the President once advises Congress that is enough. He does not have to keep Congress informed, does he?

Mr. SISK. I would certainly expect that he would keep us informed.

Mr. FULTON. There is no requirement according to your resolution.

Mr. SISK. It is the intent of the resolution. I might say to the gentleman from Pennsylvania, that not only would we be informed in the event he takes actions under certain criteria and then informs us within 24 hours but at that point I would assume certain actions would be set in motion.

Congress would either approve or disapprove, which would okay continuing in the same direction or which would signal a change.

It seems to me this restraint is necessary if Congress is to fulfill its policymaking powers.

Mr. FULTON. Then if that is the case, you want action by Congress. The question is what kind of action.

You have used the words "approval" and "acquiescence." Acquiesce means by definition to comply quietly or accept tacitly or passively. That does not mean approval. That is from the old Latin acquiescere, which means just keep quiet and go along.

You have also used the word "approval" which, of course, comes from the old French and the old English. The old English is "approven." That approval means something that is much different than acquiesce because that means a specific act of consent, of agreement.

So that what must be done, is distinguish between acquiescence of Congress and approval. Now, which do you mean?

Do you mean Congress must approve the actions of the President specifically and completely or do you mean that we just go along and acquiesce in them?

Mr. SISK. Let me tell the gentleman exactly how I interpret it. I interpret it to mean approval or disapproval.

Mr. FULTON. So acquiescence is not enough?

Mr. SISK. So far as I am concerned, no, because we are dealing in an area where Congress has to take responsibility, very definitely.

Leaving to the wisdom of this subcommittee the interpretation of language, I specifically mean approval.

In other words, at that point we either approve what the President has done or we disapprove.

SISK BILL: NO TIME LIMIT ON PRESIDENT

Mr. FULTON. The next point is that you have no real requirement, when this is sent to the Congress by the President, of any termination point or any reduction in a point of time.

You do not put any time limit on the President at all, do you?

Mr. SISK. I am not certain that I understand the question. I am not certain as to why there would be any necessity of time limitation. The Javits resolution only gives the President 30 days to keep on doing whatever he is doing.

I give him 24 hours, because I think the President must have freedom to act very quickly at times as I am sure my colleague from Pennsylvania agrees.

Now, once he has carried out an emergency action because of the imminence of attack or attack underway, then he consults the Congress within 24 hours.

At that point Congress then takes action. At least that is my intent. We either approve what he is doing and support him by resolution or we disapprove and say, no, period.

Mr. FULTON. Suppose Congress does nothing then for a week, what happens?

Mr. SISK. I cannot, of course, believe——

Mr. FULTON. We must look at probabilities, of course.

Mr. SISK. Of course, until such time as Congress took action it would seem to me the President in exercising his responsibility as Commander in Chief, would go ahead and do whatever he thought was best.

I have said that he must report to us within 24 hours. If we are not in session he must call an extraordinary session within 24 hours for purposes of reporting.

Certainly, if we in Congress are derelict in our duty if we simply do not act, the President has the responsibility to go ahead and do the best he can under whatever circumstances until Congress has acted.

I would hope that Congress would not be derelict.

WOULD GIVE PRESIDENT FREEDOM TO ACT

Mr. FULTON. When you say the words "go ahead," do you mean maintain the status quo, continue the President's action at the time he made the report, or do you give him leeway?

Can the President escalate, deescalate or deploy or not deploy?

Are you going to say to the President to maintain the status quo even if it is a movement status quo. Or would you hold the President still until Congress approves or disapproves?

Mr. SISK. The President, as I would see this, would have total authority to do what he felt in his judgment best until such time as Congress has acted.

Mr. FULTON. So he could put the 16,000 advisory MAG troops into Indochina in that period and change them over to combat troops if Congress has not acted?

Mr. SISK. That is right. Until such time as we act he will use his best judgment and do as he sees fit. He is, of course, required to report to us within 24 hours.

Then, it is up to the Congress to take action. I question, and again I am not challenging Senator Javits or anyone else, but I question the necessity of time limitation.

The point, it seems to me, is that the American people today are concerned that we are seeing men sent into combat contrary to what some of us believe are the constitutional powers of the President.

Now, in addition to giving Congress certain authority, we are assuming grave responsibilities. If Congress does not act, then we have not lived up to our responsibility.

So, to put in any time limitation seems to me pointless. Maybe I do not see the whole picture.

POSSIBLE APPLICATIONS OF SISK BILL

Mr. FULTON. Would you, for example, in the recent Caribbean situation which almost occurred, permit the President to have a landing force of Marines so that he could act to protect American lives and property but he keeps the Marines on board a carrier or transport just beyond the horizon, within, say, a combat distance of a particular country?

Would you let him do that?

Mr. SISK. As long as they are on an American ship and not in foreign territory and as long as they are not in combat there would not be any automatic restriction under my resolution.

In that event, the President is utilizing his powers under the Constitution for peaceful purposes.

Mr. FULTON. Would you differentiate between combat-purpose troops and supply or logistics-purpose troops or facilities support troops?

Mr. SISK. Not being a military expert, nor a foreign policy expert, I think we get into a problem in writing legislation of quibbling over semantics.

Mr. FULTON. We are discussing it to see what you mean by your words. You see, we are trying to pin down at what points these various tremendous required steps go into operation upon the American Government actions that affect the American people basically, as basically as you can affect anybody.

Mr. SISK. If I can just give an illustration. If we sent troops to Vietnam or we sent troops anywhere in combat, where there was danger of American soldiers being killed, even though they were in a supply unit or any other kind of unit, that would fall within the requirement of approval by the Congress.

Anyone in that area having anything to do with the effort it seems to me becomes part of combat troops. Are we sending them for peacekeeping purposes or are we sending them for combat?

This, to me, is really the crux of the question.

APPLICATION TO ATTACK ON TRUST TERRITORIES

Mr. FULTON. The Japanese mandated islands have been taken over by a resolution of this committee whereby the United States is the trustee under the United Nations Security Council with the right to fortify, and we are the sole trustee, not under the General Assembly.

Would any kind of attack on those islands which lie between the Philippines and Hawaii be within the purview of your resolution where we are simply a United Nations trustee?

Mr. SISK. Yes, sir; they would be.

Having been a member of the committee that spent some months in the trust territories working with the legislature, I would construe an attack upon those just as I would construe an attack on the Hawaiian Islands.

Mr. SISK. This is an area over which we have sole control. An attack in that area I would call an attack on us.

Mr. FULTON. Do you mean an ally by treaty or an ally by voluntary agreement?

For example, we have a base in the Azores but we don't even have a set agreement with Portugal, oral or written. It is a NATO base and the United States uses that facility. Would you have that kind of informal arrangement as part of your resolution, too?

Mr. SISK. I am not sure that I follow your question.

Mr. FULTON. In the Azores we have a facility where there is no real treaty. The agreement has run out. Would you, then, as long as the United States de facto has an installation even if it is just temporary, and has U.S. troops there or has Armed Forces supplies and facilities, if there is an attack on that, would you then put into operation your resolution?

Mr. SISK. Yes, sir; I would.

Mr. FULTON. Thank you, Mr. Chairman.

May I compliment the witness. Mr. Sisk has given very direct and explicit answers. It is a pleasure to have you with us this afternoon.

Mr. SISK. Thank you, Mr. Fulton.

Mr. ZABLOCKI. Mr. Bingham?

Mr. BINGHAM. No, thank you, Mr. Chairman. I am sorry that I was not here.

PROCEDURAL QUESTIONS IN WAR POWERS LEGISLATION

Mr. ZABLOCKI. If I may ask one final question of our colleague.

As you know, in the last Congress the subcommittee resolution was considered on the suspension calendar. Could we have the benefit of your wisdom, as a member of the Rules Committee, on the preferable way of having this brought to the floor for action, in view of the fact that it is such a complex matter?

You know there is an inherent objection on the part of some members to consider any bills under suspension or closed rule if we should get such a rule.

Would you give us your observations and considered judgment as to how we should bring a proposal to the floor?

Mr. SISK. I personally would prefer to see a rule granted because it gives the Members of Congress a better opportunity to express their will. This is a terribly important matter. I can well understand the position of the administration, this administration or any previous administration, because we are dealing with delicate matters.

But it would seem to me that a rule would be properly in order.

Again, I understand the problems of amendments and at times, as the chairman has so well stated, we have considered these under suspension because then, of course, no amendment can be offered.

I would suppose that after your subcommittee has acted, at that point it would be up to the committee to determine whether it should move under a closed rule.

If you justified that before the Rules Committee, as the gentleman knows, we do issue closed rules from time to time.

Now they are sometimes frowned on. I am not against closed rules per se. I would support a closed rule if there is a good and justifiable reason. Other than that a closed rule might lead to a situation which would do more harm than good.

I think this is a judgment matter that this committee, consulting with the Rules Committee, would have to arrive at.

I hope that a rule would be sought and we would be permitted to discuss the matter under a rule which might give us extra time. I think Members should be entitled to express their feelings on this very important subject.

Mr. ZABLOCKI. I certainly agree with the gentleman that additional time would be very helpful.

I think it is a very complex subject matter and it should be fully debated. My only concern is in the amendment stage, about what could happen to the legislation.

Mr. SISK. I share the gentleman's concern. It seems to me to be a matter for this subcommittee and your understanding of the problem combined with that of the Rules Committee to decide.

I hope that we could arrive at the right decision.

Mr. ZABLOCKI. I want to thank the gentleman and join my colleagues in expressing appreciation for your testimony.

Mr. SISK. Thank you, Mr. Chairman.

INTRODUCTION OF EXECUTIVE BRANCH WITNESSES

Mr. ZABLOCKI. Our next two witnesses are here today representing the viewpoint of the executive branch.

First we will hear from the Honorable John R. Stevenson, legal adviser to the Department of State. Mr. Stevenson testified before the subcommittee last year on the war powers issue and it is a privilege to have him back with us this year.

With Mr. Stevenson is a spokesman for the Justice Department, Deputy Attorney General Thomas E. Kauper.

We are pleased to have you with us today, Mr. Kauper.

Mr. Stevenson, if you will present your statement, to be followed by Mr. Kauper's statement, then we will begin questioning under the 5-minute rule.

You may proceed.

STATEMENT OF HON. JOHN R. STEVENSON, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. STEVENSON. Thank you, Mr. Chairman.

Mr. Chairman, it is again my pleasure to testify before this subcommittee on the serious constitutional questions under consideration. This subcommittee's work last year contributed in an important way to an understanding of the war powers issue.

As you know, Mr. Chairman, on May 14 the Secretary of State testified before the Senate Committee on Foreign Relations on the war powers question. At this point, I would like to introduce into the record the statement Secretary Rogers made.

Mr. ZABLOCKI. Without objection, it is so ordered.

Mr. STEVENSON. Thank you, sir.

(Statement of Secretary of State Rogers may be found on page 122.)

Mr. STEVENSON. I believe the Secretary's statement contains a balanced and scholarly presentation of the constitutional issues involved in the war powers question.

I do not wish today to duplicate that presentation or my own statement last year before this subcommittee. I would, however, like to take this opportunity to emphasize a few points which in my view are especially important.

At this stage in our continuing discussion we are all still familiar with the historical background of the war powers question, beginning with the drafting of the Constitution and continuing through recent historical precedents.

CONCLUSIONS TO BE DRAWN FROM HISTORY

I will not review the historical material again, but I do think some useful conclusions can be drawn from those familiar examples.

First, it is clear that the framers of the Constitution intended that decisions regarding the initiation of hostilities be made by the Congress and the President, together, except that the President was recognized as having the authority and the responsibility to use the Armed Forces on his own authority in certain emergency situations.

Second, judicial precedents and subsequent examples of presidential practice support this conclusion. However, the judicial precedents are very sparse since courts have usually regarded the subject of the war

powers as a political question and have refused to adjudicate on the merits.

Recently in refusing to rule on the constitutionality of U.S. participation in the conflict in Vietnam, the D.C. Court of Appeals stated:

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. . . .
> *Luftig* v. *McNamara*, 373 F. 2d 664, at 665–66, D.C. Cir. 1967.

Moreover, past presidential actions cannot be regarded as dispositive of the constitutional questions now under consideration. The most one can say of these historical examples is that they indicate the substantial number of times in the past that Presidents have felt constrained to take military action without prior congressional authorization and illustrate the wide range of factors which have prompted such actions.

Third, it belabors the obvious to point out the extent to which the world and our concept of the United States' role in it have changed since 1787. For example, it is difficult to underestimate the impact of such factors as the emergence of the United States as a world power or developments in technology, including nuclear weaponry.

SHARED RESPONSIBILITY: IN THE NATIONAL INTEREST

Our primary concern must be to insure that the constitutional framework of shared responsibility for the exercise of the war powers works in the Nation's best interests in this modern context.

The fundamental change in the factual setting in which the war powers are exercised emphasizes the necessity of viewing the national interest in a dynamic fashion. Our concept of that which best serves the national interest has undergone significant change since the uses of force of the 19th and early 20th centuries and, even more recently, since the 1950's and 1960's.

The Nixon doctrine represents our most current assessment of what is required in the national interest and has a direct hearing on the war powers question. The Nixon doctrine means that we will continue to honor our treaty commitments and offer a shield against nuclear threats aimed at our allies or other countries vital to our security; however, we now recognize that our national interest does not require an automatic U.S. military response to every threat. We seek a new partnership with nations of the world in which we continue to play a large and active role in world affairs, but where they become increasingly self-reliant and assume greater responsibilities for their own welfare and security and that of the international community.

I think it is also important to recognize that the constitutional allocation of the war powers between the President and Congress leaves the exercise of those powers essentially to the polictial process.

COOPERATION AND THE SEPARATION OF POWERS

This is characteristic of our constitutional system of separation of powers. It means that the effective functioning of our system depends on cooperation rather than conflict between the two branches and this, in turn, requires consultation, mutual trust and continuing polit-

ical interaction between the two branches and with the electorate. With this cooperation, legislation defining the President's war powers is unnecessary; without it, such legislation will be ineffective and will only serve to raise false hopes that legal formulas can resolve what must be an essential political accommodation between the President and the Congress, as was intended by the framers of the Constitution.

This administration respects Congress' right to exercise its full and proper role in decisions involving the use of military force and in the formulation of our foreign policy. We emphatically reject the view that Congress' power to declare war should be interpreted as a purely symbolic act without real substance in today's world.

This is more than a matter of good congressional relations or recognition that most presidential programs require implementing legislation and funding. Our respect is based on what we regard as a constitutional imperative grounded in Congress' power to declare war: If the Nation is to embark on war or upon a course of action which runs serious risk of war, the critical decisions must be made only after the most searching examination and on the basis of a national consensus, and they must be truly representative of the will of the people. For this reason, while the form of congressional exercise of its war powers may change, and has changed, the underlying principle remains constant—we must insure that such decisions reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities.

ROLE OF ELECTORATE AS RESTRAINT ON PRESIDENTS AND CONGRESS

Finally, we also recognize the role of the electorate as the ultimate restraint on both the President and Congress in the exercise of this Government's war powers. As the President has stated: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain." Report to Congress of February 25, 1971, page 16.

Let me turn now to the proposed legislation before this subcommittee. I believe that enactment of legislation which attempts to define and codify the war powers of Congress and the President would not serve the Nation's long-term interests. In my view, legislation which attempts to freeze the constitutional allocation of the war power raises serious practical and constitutional problems.

Such legislation represents an effort which the framers of the Constitution quite deliberately decided against. The attempt to draw fixed lines in the war powers area is inconsistent with our constitutional tradition—a tradition which was intended and has worked to keep the basic structure of our Nation flexible and perpetually viable. Some say flexibility is a euphemism for unchecked Executive power. This statement misjudges the nature of our political process. The Congress and the President each have war powers appropriate to their respective roles, but the Constitution does not attempt to specify precisely how far one branch can go without the other or to what extent one branch can use its powers to limit those of the other. Our constitutional framework was designed to be flexible—indeed, flexibility is the key to our nation survival—but the checks and balances inherent in our system of separation of powers provide ultimate limits.

In my opinion we do not have sufficient foresight to define these limits more rigidly and at the same time be sure that we have provided wisely for all emergencies which may arise in the future. The framers of the Constitution acted on this same premise, and we should be reluctant to reverse their judgment. Any effort to modify that judgment, as Secretary Rogers pointed out, should be considered deliberately and calmly, in an atmosphere removed from the emotion generated by the conflict in Vietnam.

CITES RESTRICTIONS IN WAR POWERS BILLS

Although most of the bills recognize to a significant extent the President's full scope of constitutional authority, they also contain some restrictions which raise serious questions. Some of the bills, for example, would not permit the President to act on his own authority to protect the Nation in situations such as the Cuban missile crisis. These bills would recognize the President's authority only in the event an actual armed attack occurred against the United States. Nor is it clear whether the bills which speak of an "imminent threat of attack" are intended to cover a Cuban missile crisis situation. I doubt very much that the Cuban missile crisis could have been resolved in the manner it was if a full-scale, congressional debate had occurred before the United States acted.

Some of these bills also require that military action undertaken by the President be automatically terminated after 30 days unless Congress enacts sustaining legislation. Some bills contain provisions for expedited action on such legislation, but even this could not insure definitive congressional action within the 30-day period. These provisions raise another constitutional issue, that is, whether the President's constitutional authority, for example, to repel an attack against the Nation or its Armed Forces, could be limited by congressional action or inaction.

PROBLEM OF 30-DAY PROVISION

The 30-day limitation could also cause problems regarding the conduct of military operations and the safety of our forces. Once forces are engaged in military action, it might prove impossible to disengage them in a safe manner within an arbitrary time period. Here, again, the bills containing this provision would impinge upon the President's authority as Commander in Chief and Chief Executive and, to that extent, would be of doubtful constitutionality.

Another problem is the fact that some of this legislation is predicated upon a declaration of war or, in one case, a declaration of national emergency. There are other forms of congressional action which can serve as a legitimate prior authorization for military action and which, in many circumstances, would be preferable from both an international and a domestic standpoint since they reflect more limited objectives.

ALL HAVE SAME OBJECTIVE: SERVING NATION'S INTERESTS

Mr. Chairman, I recognize that in our examination of this vital question many of us share the same objective, that is, to make sure that our Nation's best interests are served. I believe that the kinds of problems I have mentioned today are inevitable in attempts to define precisely in advance the circumstances in which the President and the

Congress may exercise their war powers. Congress has ample powers of its own under the Constitution which, if exercised effectively, enable Congress to play its full and proper role in decisions involving the exercise of the war powers. In my opinion, these decisions must be made jointly by Congress and the Executive in the context of a specific factual situation. In sum, I believe that Congress' right to exercise its full constitutional powers in this area does not depend on restricting in advance the necessary authority which the Constitution has given the President to respond immediately and effectively to unforeseen contingencies in accordance with our constitutional processes.

At the same time, Mr. Chairman, I wish to make once again a suggestion I made before this subcommittee last July: Let us continue broad and searching discussions between the executive and legislative branches as to the best means of achieving that cooperation in the exercise of the President's and Congress' respective war powers which is essential to the effective functioning of our Government in accordance with the constitutional plan.

SUBCOMMITTEE'S HEARINGS ARE VALUABLE

In the first place, such discussions, as this subcommittee's hearings have so well illustrated, are valuable in and of themselves. On the one hand, they may, we in the administration hope, lead to greater congressional understanding of the President's responsibility for maintaining this country's capacity to respond speedily and decisively and, in some circumstances without prior publicity, to unforeseem crises. On the other hand, they have already served to make us in the executive branch appreciative of the wisdom and necessity of appropriate congressional participation in decisions to use armed force abroad, as well as the need to provide Congress with the information necessary to participate in such process in a meaningful way.

Second, it would seem to me that such discussions could and should lead to improvements in the existing procedures for cooperation between the two branches. Secretary Rogers has indicated the State Department's willingness to explore ways of helping Congress reinforce its information capability on issues involving peace and war. One example he gave would be to provide full briefings on a regular basis by the Department's regional assistant secretaries with respect to developments in their respective areas. The Secretary also indicated the Department's willingness to discuss with Congress the suggestion from a number of quarters, including Representative Horton, for the establishment of a joint congressional committee to consult with the President in times of emergency. Consultation with such a committee might well be an effective institutional means of keeping the requirements of speed and secrecy from becoming an obstacle to meaningful and current congressional participation in the decisionmaking process. You, yourself, Mr. Chairman, have been particularly interested in perfecting arrangements for prompt and full reporting to the Congress of Presidential actions involving the use of armed force. I believe you would agree that the administration has not been unresponsive to your thinking in this regard.

CONCLUSION: BELIEF IN "SHARED RESPONSIBILITY"

In short, Mr. Chairman, while we do oppose strongly any attempt by statute to take from the President the powers and responsibilities which the Constitution has vested in his office, we do respect Congress' constitutional role in the exercise of this Government's war powers and hope to work with you and your colleagues in making the two branches' exercise of shared responsibility for the exercise of the war powers both more harmonious and more effective.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Mr. Stevenson.

The subcommittee will be in recess until 3:30.

(A brief recess was held.)

Mr. ZABLOCKI. The subcommittee will resume its hearing.

We will now hear from Deputy Assistant Attorney General Thomas E. Kauper, Office of Legal Counsel.

STATEMENT OF THOMAS E. KAUPER, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. Chairman, I am pleased to accept the subcommittee's invitation to appear on behalf of the Department of Justice to discuss the constitutional issues with respect to the division of the warmaking powers and the legislative proposals now before this subcommittee.

Assistant Attorney General Rehnquist, who appeared before this subcommittee last July 1, is presently recovering from an operation, and he has requested that I appear in his place.

In view of the fact that the broad constitutional issues and precedents have been treated exhaustively by Secretary Rogers in his recent testimony before the Senate Foreign Relations Committee, and by Mr. Stevenson and Mr. Rehnquist in their testimony of a year ago, I shall keep my discussion of those issues and precedents rather brief and, instead, direct primary attention to the proposed bills and resolutions on the subject.

The constitutional issues are difficult ones. As the Constitutional Convention debates, historical usage, and limited judicial precedents indicate, the warmaking powers to a very considerable extent fall within an area of "shared" authority.

WAR POWERS EXCLUSIVE TO CONGRESS

Unquestionably, Congress has war-related powers which are exclusively within its province; on the other hand, the President just as surely has exclusive prerogatives of his own in this area.

Congress, for example, is the only branch of Government which may declare war or determine the amount of money to be appropriated for the raising and supporting of the U.S. Military Forces.

In contrast, the President alone has the authority to repel sudden attacks, determine the manner in which hostilities lawfully instituted shall be conducted, and protect the lives and safety of U.S. Forces in the field.

These are the clear cases. However, the difficulty which arises is in the middle ground—in those situations in which the question is

whether or not American Armed Forces should be deployed or committed to limited hostilities abroad.

In this area, the framers did not rigidly define the respective constitutional roles of the President and Congress. They opted instead for a more flexible design, one in which responsibility would be joint and in which the procedures and responses would be determined by the particular circumstances of the wide variety of international situations which might confront the Nation.

WISDOM OF "FLEXIBLE APPROACH" TO PRESIDENTIAL WAR POWERS

Without cataloging the numerous situations in which the Armed Forces have been deployed or committed abroad in the past, I think it fair to say that they attest to the wisdom of the flexible approach adopted by the framers.

Congress has, on numerous occasions, specifically authorized the use of troops in advance.

On some occasions, Congress has acquiesced in the President's action without formal ratification; on others, it has formally ratified the President's actions; and on others, no action at all has been taken.

From time to time, individual members of Congress have protested Executive use of the Armed Forces. Indeed, at the close of the Mexican War, on a preliminary vote one House of Congress indicated its disapproval.

The fact that the Congress and the President have interacted in these many ways in the various situations which have arisen seems to me to demonstrate the merit of the framer's scheme.

PENDING PROPOSALS: BURDEN OF JUSTIFICATION

For this reason, I would think that those pending proposals which mark a sharp departure from the salutary lessons of history must bear a heavy burden of justification.

I do not believe that the proposals attempting to define and limit the President's authority in advance meet that burden.

Moreover, the precise, strict definition of Presidential authority contained in some of those proposals is a potentially dangerous action in the highly sensitive area of foreign relations.

Peace in the world depends on maintenance of a delicate balance of power and on the recognition by the various nations of the world that other nations have the ability and determination to react in the event of aggression.

This Nation, therefore, must be able to respond quickly to rapidly developing and highly variant international situations posing a threat to the vital interest of the country.

Our past Presidents have acted to meet such threats in the past, both with and without prior congressional authorization, and I, for one, do not believe that it would serve the interest of world peace to limit the President's authority to meet such threats in the future.

CUBAN MISSILE CRISIS: AN ILLUSTRATION

The Cuban missile crisis poses a stark illustration. Those proposals before the subcommittee attempting to limit the President's powers to

use armed forces to repel attacks on the United States or its forces, and to protect American citizens, would not cover that situation.

Nor is it clear that the Nation was under imminent threat of attack.

Hence most, if not all, of these pending bills would apparently require prior congressional authorization. Yet, the situation was a grave one, posing a substantial threat to our security and requiring immediate action.

I believe there are few who would suggest that the speedy and effective response ordered by President Kennedy was inconsistent with our constitutional framework.

Not only must the Nation be able to act quickly when its security requires such action, but our adversaries must realize that we have the ability to do so.

Otherwise stated, we must be prepared to act and our adversaries must know that we are prepared to act. To the extent that some of these proposals would contribute to a belief among the leaders of foreign nations that the United States would be unable to mount an immediate response to an international crisis, the purposes of the world peace would be ill-served.

Secretary Rogers made the point in his testimony before the Senate Committee on Foreign Relations when he observed:

> To circumscribe Presidential ability to act in emergency situations—or even to appear to weaken it—would run the grave risk of miscalculation by a potential enemy regarding the ability of the United States to act in a crisis. This might embolden such a nation to provoke crises or take other actions which undermine international peace and security.

Apart from the consideration just discussed, and independent of them, it does not seem to me that the necessity for such legislation has been demonstrated.

No President could fail to recognize the need for a popular concensus and a working relationship with Congress in connection with decisions to deploy or commit the Armed Forces.

PENDING BILLS WOULD COERCE PRESIDENT

These bills can only be predicated on a contrary belief—namely, that the Chief Executive must be coerced into recognizing congressional prerogatives. I simply do not believe this is a realistic assumption in view of the checks and balances which exist throughout our political system.

Underlying these bills is the assumption that Congress must assert itself and that the restrictions on the President's authority to deploy and commit troops are an appropriate means to this end.

The fallacy in this, it seems to me, is that the Constitution grants Congress numerous powers in this area. Article I, section 8, contains specific grants of the powers "to raise and support armies", "provide for the common defense", to "declare war, grant letters of marque and reprisal", and "make rules concerning captures on land and water", "provide and maintain a navy", "to make rules for the government of the land and naval forces", and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *".

Can it reasonably and realistically be contended that Congress is without constitutional authority to assure for itself a meaningful role

in relation to the use of the Armed Forces or that bills such as those now pending before the committee are necessary to assure that role?

As a final general observation about these proposals, it must, of course, be noted that legislation cannot alter the constitutional balance.

Thus, if the President has certain exclusively Executive powers, as, for example, to repel sudden attacks, those powers may not be intruded upon by conflicting congressional mandates.

To the extent then that the proposed legislation would attempt to narrow the President's constitutionally recognized prerogatives, it is unconstitutional.

And, to the extent that any such legislation gives full recognition to Presidential prerogatives, it becomes an unnecessary codification of the status quo entailing the potential consequences to which I have referred.

SPECIFIC DIFFICULTIES IN PENDING PROPOSALS

Let me now turn to a few of the more specific difficulties with the pending proposals.

Most of the bills do recognize the President's constitutional authority to a very considerable extent. There are instances, however, where they do not. Other provisions are unclear.

Each of the bills would contain an exception permitting the President to repel an attack on the United States. As noted, however, it does not appear that any of the bills would have covered the Cuban missile crisis.

Certain of the bills cover "imminent threats" as well as actual attacks, and we agree that the former must be included.

However, even with this addition, the provisions in the bill might be too restrictive to cover the Cuban missile situation.

A number of the bills would permit a Presidential response to attacks on the Armed Forces only if the troops when attacked were "on the high seas or lawfully stationed on foreign territory."

What if the troops happened to be lawfully within the territorial waters of a foreign nation at the time they were attacked?

Similarly, the term "lawfully stationed" is ambiguous. Would the term permit a Presidential response to an attack on troops deployed at the President's sole direction?

Historically, the President has repeatedly deployed troops abroad, and we would assume, therefore, that such troops would be "lawfully stationed."

OPPOSE CONDITIONS ON "PROPRIETY" OF ACTION ON TROOPS ABROAD

Any other construction would present a serious constitutional issue. We oppose in principle, moreover, the attempt to condition the propriety of a Presidential response on the location of the troops at the time they were attacked.

With respect to the so-called "national commitment" exception, I would point out the approach followed in Congressman Nix's bill differs from that of the other bills.

The Congressman's proposal would explicitly provide that congressional authorization would be necessary prior to use by the President of the Armed Forces in discharging a treaty commitment.

The other bills, in contrast, would permit the President to employ the Armed Forces in this situation without prior specific authorization.

The sharply differing approaches taken to this question in these bills tend to highlight the extraordinary difficulty in trying to define in advance of actual, concrete circumstances, the authority of the President to act in emergency situations.

In suggesting the deficiencies in the pending bills and implying that certain of these deficiencies might be remedied, I in no way wish to recede from the opposition of the Department of Justice to legislation attempting to define the respective constitutional roles of the President and Congress.

As already noted, these deficiencies in themselves reflect the extraordinary difficulty and danger in attempting to place limitations on the use of Armed Forces well in advance of wholly unpredictable situations.

CONSTITUTIONAL PROBLEMS WITH PENDING LEGISLATION

Moreover, we do not believe that any of the bills recognizes adequately the President's constitutional responsibility to respond immediately to emergencies presenting substantial threats to the vital interests of the Nation.

It is precisely this failure which in my judgment throws a cloud over the constitutionality of each of these bills.

Entirely different considerations are involved in the reporting requirements that each of the bills contain. As Assistant Attorney General Rehnquist indicated last year in his testimony before the subcommittee, the Department does not regard a reporting requirement as raising a substantial constitutional question, the only reservation being that the time allowed is not unduly short and the report is not unduly burdensome.

24-HOUR REPORTING PROVISION NOT REALISTIC

Certain of the bills contain a 24-hour provision, and we would suggest that this may not be realistic. We would prefer the formulation contained in Chairman Zablocki's resolution which requires that the President report promptly.

As to the scope of the report, a full account of the circumstances seems entirely appropriate, but a requirement that the President estimate or evaluate the expected scope or duration may be unwise in that it would appear to call for some degree of Presidential guesswork which could prove adverse to the national interest, to the extent that it requires a disclosure of American intentions.

Finally, we wish to express our reservation about the provision in the chairman's resolution which would require the President to explain his reasons for not seeking specific prior congressional authorization.

If the President explains the legal justification for his action, we would submit that his duty to justify or explain should be at an end.

OPPOSES 30-DAY PROVISIONS

I shall now turn to the provision in a number of bills to the effect that Presidential action falling within one of the exceptions would be

terminated after 30 days unless Congress had affirmatively acted to authorize a continuation of the hostilities.

It seems paradoxical that those who support the assertion of congressional authority in the warmaking field would support a provision which would effectively permit the Congress to assert itself by inaction.

If the President commits the Armed Forces and continues the commitment for 30 days, he would presumably be in favor of a further continuation.

Congress, however, would be in the position of denying the authority for that continuation by taking no action at all. While those in support of the provision contend that it will assure a role for Congress in that the President will be required to consult Congress before continuing beyond the 30-day limit, it would seem that Congress should at least be required to vote the extension either up or down and not escape the issue by silence.

If one, however, agrees that an up or down vote is the appropriate way for Congress to assert itself on a commitment or deployment of the Armed Forces, then the 30-day limit creates an artificial and arbitrary limit which would serve only to impose pressure on the Congress in its deliberations.

The 30-day maximum presents other difficulties. Any time limitation upon the President's authority to repel an attack presents a serious constitutional issue.

Moreover, it may be well nigh impossible in some situations for the President to withdraw the forces immediately upon the tolling of the 30-day period.

The President as Commander in Chief has constitutional responsibility and authority to protect the safety of troops in the field.

Any attempt by Congress to require an immediate withdrawal not taking into account the troops' safety would surely be an unconstitutional application of this provision.

Even were the troops' safety taken into account, a 30-day limitation might be constitutionally objectionable on the ground that the President might at the 30th day be engaged in repelling a sudden attack—an exclusive Presidential prerogative.

Each of these reasons compels us to urge against the adoption of a provision imposing an arbitrary time limit on the President's use of the Armed Forces already committed.

Several of the proposals contain provisions which would explicitly authorize Congress to terminate, prior to the expiration of the 30-day period, the President's authority to commit the Armed Forces.

This provision seems unnecessary.

Either such congressional termination, when enacted, would be constitutionally valid or it would not.

The critical consideration in each instance is not whether authorizing legislation of this nature has been enacted previously, but instead whether the congressionally ordered termination would conflict with any of the President's powers as Commander in Chief.

The point for present purposes, however, is that Congress is in no way required to enact legislation authority itself to terminate hostilities.

CONGRESS HAS TOOLS FOR WAR AUTHORITY NOW

I would conclude with what I think is a point at the heart of the issue.

In my view, Congress has broad authority over matters integrally related to the exercise of the war-making authority.

If, in any given case, Congress is desirous of asserting itself, it has all the tools at its command. I think it derogates the congressional role for Congress to feel the need to assert itself through the rather artificial means embodied in the legislative proposals which would codify what is conceived to be the constitutional allocation of authority.

Such a step would be wholly inconsistent with our historical constitutional traditions, and would in no significant way aid in assuring a meaningful role is war making for Congress.

Thank you, Mr. Chairman.

VIEW OF HOUSE JOINT RESOLUTION 1

Mr. ZABLOCKI. Thank you, Mr. Kauper.

From your presentation and that of Mr. Stevenson, there is no question that consultation with, and reporting to, Congress is desirable?

Mr. KAUPER. You are speaking of your resolution?

Mr. ZABLOCKI. Yes.

Mr. KAUPER. That is correct from our point of view.

Mr. ZABLOCKI. One page 6 you state that war power bills are predicated on the belief that the Chief Executive must be "coerced into recognizing congressional prerogatives."

Do you believe that description fits House Joint Resolution 1?

Mr. KAUPER. That description is intended to refer to the bills which are described in the preceding section, those which define powers.

No; I don't think that is true as to House Joint Resolution 1.

Mr. ZABLOCKI. In your estimation, would House Joint Resolution 1, if enacted, be unconstitutional at any point?

Mr. KAUPER. I don't believe it would, Mr. Chairman.

Mr. ZABLOCKI. On page 10—and I don't believe you mean this for House Joint Resolution 1, either—but you state there that you "do not believe that any of the bills recognizes adequately the President's constitutional responsibility to respond immediately to emergencies presenting substantial threats to the vital interests of the Nation."

Earlier, on page 8 you similarly say, "As noted, however, it does not appear that any of the bills would have covered the Cuban missile crisis."

Do you mean to apply that observation also to the House Joint Resolution 1?

Mr. KAUPER. No; that observation on page 10, again, relates to our statement of opposition to legislation which attempts to define the respective constitutional roles.

Mr. ZABLOCKI. Page 8 of your statement refers to what particular bill? You make a rather blanket statement, that not any of the bills would have covered the Cuban missile crisis.

Mr. KAUPER. I am looking for it on page 8.

Mr. ZABLOCKI. The first full paragraph.

Mr. KAUPER. Yes.

This, again, Mr. Chairman, is in the reference dealing with the definitional bills. It does not refer to House Joint Resolution 1.

NO OBJECTION TO ZABLOCKI RESOLUTION

Mr. ZABLOCKI. Mr. Stevenson, nowhere in your statement did you comment on House Joint Resolution 1.

What is your view of that proposal?

Mr. STEVENSON. Mr. Chairman, I thought that I did by implication because I indicated we have not been unresponsive to your own thinking on the question of reporting.

I now will state for the record that we have no objection to House Joint Resolution 1 and I think it is generally consistent with what we are proposing to do.

We are not sure it is necessary to do it by statute.

Mr. ZABLOCKI. I do want to point out there have been some minor changes from the resolution that was passed in the last Congress.

You do not find any troublesome——

Mr. STEVENSON. I am thinking along the general lines. Some of the comments that the Department of Justice made I think have validity, too, but the general lines of the legislation are acceptable to us.

Mr. ZABLOCKI. I believe in our colloquy a year ago I stated that it is not our intention to cause problems for the executive branch but we do want to prod it into increased consultation and to fuller reports.

If it is necessary by resolution I think we should pursue that.

Do you believe that the provisions of House Joint Resolution 1 would place undue restrictions on the President?

Mr. STEVENSON. I do not think they would be unduly restrictive on the President.

Mr. ZABLOCKI. Would the provisions in any way impede his flexibility in time of crisis?

Mr. STEVENSON. I think they would not.

JOINT CONGRESSIONAL COMMITTEE PROPOSAL

Mr. ZABLOCKI. On pages 10 and 11, Mr. Stevenson, you discuss the proposal of Representative Horton to create a joint congressional committee to consult with the President in times of emergency.

I rather like that provision. Unfortunately, under the rules of the House we cannot incorporate it in our resolution. We cannot create a joint comittee by legislation in this committee.

But I look upon it as possibly a better means of consultation, as you have implied.

What problems does the President now have in consulting with Congress in times of emergency?

How in your view would such a joint committee solve those problems?

I believe you referred in your statement to secrecy.

Mr. STEVENSON. Mr. Chairman, the question of the function and composition of this joint committee is something basically for the Congress to decide.

We would be delighted to work in consultation with you as to the details of it. This particular suggestion involves a fairly large committee. I am not sure that a committee quite that large would be as

effective as a somewhat smaller committee in terms of acting rapidly and being fully effective in terms of consultation.

But I do think that this is a suggestion that has been made from several different quarters. Secretary Rogers has also indicated his willingness to discuss this proposal further.

Mr. ZABLOCKI. Mr. Kauper, perhaps this is an unfair question to ask of you, but Representative Horton's proposal includes the chairman and ranking minority member of each committee, Foreign Affairs, Foreign Relations, Armed Services, and Judiciary, rather than Appropriations.

He does not include members of the Appropriations Committee. As a representative of the Justice Department, do you see any reason that the Congressman may have had a preference for the Judiciary over the Appropriations Committee?

Would the Judiciary Committee have unique prerogatives or contributions to make to such a joint committee? I intended to ask that of the Congressman but I forgot.

Mr. KAUPER. I suppose the Judiciary Committee might be thought to have some particular expertise with respect to the constitutional issues that may arise.

I guess I am not quite sure what his reasons for preference might be.

Mr. ZABLOCKI. I think a joint committee, if the Senate would agree, would be indeed a vehicle for consultation which, of course, is the intent of House Joint Resolution 1.

That is all I can ask at the moment. My time has expired.

I will call on my colleague, Mr. Findley, and ask Mr. Frazer to take the chair.

THE NEED FOR NEW WAR POWERS LEGISLATION

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. Stevenson, I believe in your statement you questioned whether there is any need for legislation in the war powers field.

I take a different view primarily because it is my opinion that our Nation is apt to get into major conflicts not after moving forces to foreign territories but by virtue of having forces stationed in areas of potential conflict and hostility.

There is nothing to my knowledge in the statute books or clearly set forth in the Constitution which establishes a relationship between the executive and the legislative branches which would keep the Congress informed whenever the President does see fit to station substantial military forces on foreign territory.

Do you have any comment on that?

Mr. STEVENSON. Congressman Findley, our objective is primarily to legislation attempting to define or codify the President's powers.

With respect to the question of reporting and consultation I think it is evident both from the statement I made and also from Secretary Rogers' statement that it is clearly this administration's policy to be as cooperative as possible and to institute some regular procedures to make this more effective.

I think basically what we are saying is that we would propose to do the same things without legislation but clearly a sense of the Congress resolution in this area is not something that the administration is going to object to.

NEED FOR PRESIDENTIAL REPORTING IN CRISES

Mr. FINDLEY. I draw your attention to the events in Laos in early February in which we introduced heavy air power, military action from the air, and some activities on the ground, although those were very limited.

By then the Gulf of Tonkin resolution had been repealed by act of Congress and the repeal signed by the President, and therefore the President had no resolution by the Congress to draw upon for authority for expanding operations into the Laotian area.

House Joint Resolution 1, had it been law by that date, would have required that he give a formal written prompt report to the Congress stating the circumstances causing him to do this and giving his legal justification.

No such report occurred to the best of my knowledge. So I think that there is a need for a statute which would require reporting in similar circumstances in the future.

Mr. STEVENSON. I think that in fact a number of the requirements that were met, I know on several occasions the question of the President's authority to take that action has been addressed by administration spokesmen, indicating that this was pursuant to his general policy of effecting withdrawal of our troops in the most effective way, protecting the safety of our troops.

Mr. FINDLEY. In the field of war powers we have but one Commander in Chief and but one Congress. I find anything except a Presidential response, a Presidential report, far less desirable than one that is direct.

I do not see any substitute for the President as Commander in Chief feeling a personal responsibility to consult with and to report to the Congress.

TREATY COMMITMENTS AND A NUCLEAR SHIELD

Mr. Stevenson, on page 3 you state:

> The Nixon Doctrine means that we will continue to honor our treaty commitments and offer a shield against nuclear threats aimed at our allies or other countries vital to our security.

Now I do not know of any treaty provision through which we offer to be a shield against nuclear threats. We do have treaty commitments, of course, but I am curious to know if there is something I have overlooked, any treaty obligations that would obligate our country to be a shield against nuclear threats?

Mr. STEVENSON. This is separate from the treaty commitment provision. This is a statement actually taken from one of the President's own statements.

Mr. FINDLEY. President Johnson made a statement to that effect.

Mr. STEVENSON. It is a statement of policy rather than a statement of treaty commitment because it indicated that there may be situations where a country is not covered by an express treaty commitment.

Mr. FINDLEY. But you would not leave the impression that the Nixon doctrine means that the President would undertake a military response to protect against nuclear threat without prior consultation with the Congress?

Mr. STEVENSON. No.

Even the treaty commitments in all cases involve a provision for

appropriate consultation for action in accordance with our usual constitutional processes.

So, all the more would that be true in this situation.

UNIQUENESS OF NATO

Mr. FINDLEY. I think that is true with the possible exception of NATO. I know there are some discussions as to how automatic the military response must be under the NATO treaty.

It is unique in its phraseology in that respect.

Mr. STEVENSON. In fact, in the NATO treaty they separate the section containing the obligation to act from the section providing for action in accordance with appropriate constitutional procedures.

We take the position that in fact the situation is the same under the NATO treaty as under the other defense treaties.

Mr. FINDLEY. On page 4, you say—

> We emphatically reject the view that Congress' power to declare war should be interpreted as a purely symbolic act without substance in today's world.

Under Secretary Katzenbach, in testifying before the Senate Foreign Relations Committee several years back, described the war declaration as outmoded phraseology.

It seems to me that this administration has taken a precisely opposite view from that expressed by Mr. Katzenbach.

Is that a fair interpretation?

Mr. STEVENSON. Certainly that is a fair interpretation if his statement is taken to mean that Congress' war powers as set forth in the power to declare war no longer have any substantive reality.

SENATE VIEW OF 30-DAY PROVISION

Mr. FINDLEY. Mr. Stevenson, the Senate Foreign Relations Committee seems to have pretty well bought the idea of a 30-day time limit in some form. At least the responses of committee members and statements by committee members would seem to indicate that and certainly most of the witnesses who testified supported such a concept.

This would run into very serious objections that you have voiced here. There is another form for delimitation that I ran across just recently and that form would be on this basis:

That the President would not be able to commit or engage more than 25,000 combat forces for more than 30 days without express approval of the Congress.

Would you find a delimitation of this type objectionable?

Mr. STEVENSON. I think as a practical matter it may avoid some of the practical problems. I think from a constitutional standpoint, I have some of the same difficulties with it because I think basically the question of whether more or less than 25,000 troops are involved does not take away from the President's responsibilities and duties as Commander in Chief.

Clearly the number of troops involved is only one of the facts in the particular situation. You have also to take into account the extent of the threat that is presented to the United States and the consequences for troops that may already be committed of any such restriction.

It might be necessary to protect the safety of troops that are already committed to use additional troops. It also seems to me that perhaps his might defeat some of the very things that you are trying to achieve because it might be taken as suggesting that as long as less than 25,000 troops were involved there is no necessity for consultation and reporting or any other of the suggestions that have been made.

Mr. FINDLEY. It would tend to impede a gradual enlargement of the conflict such as we had in Vietnam. It would establish a point beyond which we could not expand the use of ground forces, but at the same time it would leave to the President tremendous latitude in the use of seapower and airpower and nuclear strike forces.

So, it would be a mixed approach to this gray area.

I have intruded too heavily on time, Mr. Chairman.

PRESIDENTIAL ACTION AND INTERNATIONAL LAW

Mr. FRASER (presiding). Mr. Stevenson, it is difficult when looking at this question to ascertain the extent to which the President may be circumscribed by international law either as embodied in the United Nations Charter or otherwise.

For example, take the Bay of Pigs invasion. Do you think that was lawful under accepted principles of international law?

Mr. STEVENSON. Mr. Fraser, I would rather not comment on a previous administration.

I am quite prepared to talk about what this administration has done but I don't think it is appropriate for me to comment on——

Mr. FRASER. Let us put the question hypothetically.

Suppose the United States engineered an invasion of a neighboring Caribbean country because the United States disliked the regime controlling the country.

Mr. STEVENSON. Let me put the answer in this fashion:

Under the United Nations Charter we have restrictions on the use of force. Clearly force can be used consistent with the charter where the appropriate organs of the United Nations have authorized such action.

In addition, you have two provisions, one allowing action pursuant to the action of a regional body constituted under the charter and finally you come down to the most important provision of all which deals with the question of collective or individual self-defense.

You have to justify the use of force that is not otherwise authorized under the charter pursuant to the provisions relating to individual or collective self-defense.

So that normally the use of force should be related to one of these areas. Now there are obviously in addition to that the generally accepted rules under international law involving the protection of your own Nation and other matters of that nature.

Mr. FRASER. Are you saying that under my hypothetical case the American action would appear to be a violation of international law?

Mr. STEVENSON. Again, I don't think it is useful for me to speculate on hypothetical cases.

When you use the word "invasion," clearly aggressive war, initiation of aggressive war is something that you can't do under the United Nations Charter.

The determination of what you can do in terms of self-defense is something that you have to look at in terms of a particular fact situation to determine whether in fact the response was justified, given all the particular facts.

As you probably know, under the U.N. Charter when you do rely on self-defense you have to report to the Secretary General, indicating why you think the particular response was a justifiable exercise in self-defense.

PRESIDENTIAL ACTION AND THE U.N. CHARTER

Mr. FRASER. I do not mean to involve you in old issues. However, I am concerned whether a President may, on his own initiative, without authorization from Congress, commit U.S. Forces to actions which would be considered violations of the United Nations Charter.

Let us suppose, for example, that the President's action would be considered a violation of the charter. Does he have that power?

Mr. STEVENSON. Basically, we are talking about two different situations.

One is when the President of the Country acts in a particular way and the question is whether the action is consistent with international law and particularly the present highest form of that international law; namely, the U.N. Charter.

If we violate the U.N. Charter, the consequences are basically that we subject ourselves to action by the United Nations and members of the United Nations for violating the U.N. Charter.

The consequences of violating the charter basically do not relate to the question of the President's domestic constitutional authority.

Mr. FRASER. Let us put it in another way.

Treaties are regarded as the supreme law of the land. Is that the constitutional principle?

Mr. STEVENSON. That is correct.

Mr. FRASER. Is the President bound by those treaties when the treaties constrain the exercise of his power?

Mr. STEVENSON. Basically the section of the Constitution that you are dealing with, and I defer to my colleague from the Department of Justice on this, is the supremacy clause.

Basically this indicates that in terms of litigation and the application of law within the United States in our courts the treaties are to be treated on the same level as other legislation in determining the rights of private citizens.

Now, clearly I think that the responsible officials of this Government are also required to act in accordance with international law because if they don't the United States becomes liable internationally for that violation.

In fact, one of the functions of my own office within the State Department is to make sure that the international law consequences of actions that are taken are appreciated because clearly we do not wish to be in violation of the international laws.

INTERNATIONAL LAW VERSUS NATIONAL LAW

Mr. FRASER. I gather there are two different issues here. One occurs when the United States has a relationship with other nations or with international bodies.

My question goes to the power of the President. Does he have the authority to undertake an act which would place this Nation in violation of international law?

I think you said that the President didn't have that authority. But I am not clear exactly what constraints exist on the President's power.

Mr. STEVENSON. We are talking about two different legal systems, the international legal system and our own constitutional legal system.

Mr. FRASER. But our own system recognizes the force of treaties.

Mr. STEVENSON. That is correct, in terms of application in our courts and it gives effect under our supremacy clause to treaties.

Clearly the President's advisers would advise that no action be taken contrary to international law. But I think the issue you are raising is whether international law is also, as it were, incorporated in the constitutional restrictions on the President's authority.

I think my answer to that would be that I think the President's advisers would advise him to act in accordance with international law.

But there can be situations where the legal system is in conflict with international law.

CITES THE DOMINICAN REPUBLIC INVASION

Mr. FRASER. Let me make it more concrete.

Take the Dominican Republic invasion. Assume that the claim that U.S. nationals were in danger was not, in fact, a legitimate claim, as it wasn't. The President nevertheless ordered forces to land. Let us assume that a Marine declined on the grounds that the President, by ordering troops into the Dominican Republic, was in violation of international law.

What then?

Mr. STEVENSON. Here, again, we are not talking about a matter of private right in the usual sense. I think as the case I quoted in my statement indicates, in this area the attitude of the courts would be that this is basically a political question and they would not be inclined to interpose a constitutional objection to the President's action in this area.

Really substantially we are not far apart because in fact the President and the executive branch regard compliance with international law as one of our major responsibilities.

But I do not think that you can link that to the constitutional question.

Mr. FRASER. Mr. Stevenson, it is quite clear the United States, from time to time, flagrantly and substantially disregards international law.

I am not impressed by any contrary assertion on your part. It may well be that the United States advances the cause of international law more often than we impede its advance but it is clear that we violate that law when we think we have an interest in doing so.

But let me come back to my question. You contend that the courts would rule, in the face of a satisfactory demonstration that the President's order was in violation of international law, that they could not sustain the right of a member of the Armed Forces to decline to carry out the President's order?

COURTS NOT APPROPRIATE TO ACT ON INTERNATIONAL ISSUES

Mr. STEVENSON. I think the history has been that our courts would not think that they were appropriate tribunals to determine that question.

Mr. FRASER. This is not a very satisfactory state of affairs.

Mr. STEVENSON. Again, I go back to the situation. You have indicated that you think we do not comply with international law as much as we should.

I can only again speak for this administration. I think during this administration there has been an attempt to act in accordance with international law. I suggest that sometimes you may have a difference as to what international law permits.

Mr. FRASER. I am trying not to focus on this administration alone.

Mr. STEVENSON. I also think that when you say it is not a very satisfactory answer, I think that there are many international penalties for not complying with international law.

Certainly I think this country's record overall has been good in this area.

AUTHORITY FOR TROOPS IN VIETNAM

Mr. FRASER. Under what authority does the President currently maintain troops in Vietnam?

Mr. STEVENSON. The authority under which he is presently maintaining troops in Vietnam is his authority as Commander in Chief and his special role in terms of this country's foreign policy.

I think he has indicated on numerous occasions that his interest is in liquidating the war that we were involved in when he came to power and that all of his actions have been taken with a view to terminating that involvement in a way that is consistent with the safety of our troops.

Mr. FRASER. Your view is that the President has the inherent authority to deploy troops to any country?

Mr. STEVENSON. I would not say inherent. I think it is based on his power as Commander in Chief.

Mr. FRASER. Inherent in his power as Commander in Chief?

Mr. STEVENSON. Yes.

Mr. FRASER. The President could order troops to Israel tomorrow in the absence of any treaty agreement or without authorization from Congress?

Mr. STEVENSON. Again, I do not want to speculate on a particular case.

The President clearly does have power to deploy troops abroad. Congress has in the past participated in many respects in this.

We have had a number of treaty commitments involving the deployment of troops abroad. We have many status of forces——

POWER OF THE PRESIDENT TO COMMIT TROOPS

Mr. FRASER. Even without a treaty, you are saying that the President has unrestricted power to commit U.S. Forces anywhere in the world to active hostilities?

Mr. STEVENSON. You say commitment. Again, I think you are using, I think it has been recognized that the President does have the right

to deploy troops around the world when he feels this is necessary in discharging his duties as Commander in Chief.

Mr. FRASER. It is that specific statement of the President's power that causes me concern.

Mr. STEVENSON. We are talking just about stationing troops at this point.

Mr. FRASER. My question assumes that the troops would become involved in hostilities.

Mr. STEVENSON. If we are talking about committing them to hostilities, I think both Secretary Rogers' statement and my own statement have indicated that we feel that this is something that should be done jointly with the Congress, subject to the exception——

Mr. FRASER. I am not talking about what may be desirable or useful. I am talking about what you regard as the power of the President.

Mr. STEVENSON. This is something that under our constitutional system of shared powers requires joint action except in an emergency situation.

Mr. FRASER. Let us pursue that.

Is it your view that, except in an emergency the President does not have any authority to commit troops?

Mr. STEVENSON. I think we have to be very careful about the words we are using. On the one hand we talk about stationing troops.

Mr. FRASER. Let us leave stationing out.

DEFINING "SHARED POWERS"

Mr. STEVENSON. In the second situation if what you mean is the question of using troops to initiate hostilities, which basically is what you are talking about, we feel that that is something for a shared power under the Constitution except in an emergency situation.

Mr. FRASER. Let us be precise about shared power.

Are you saying that the President has no authority unless the Congress has authorized it?

Mr. STEVENSON. I think here, again, you are trying to make very precise something that the Constitution does not make that precise.

I think that there are many different ways that Congress can in fact exercise its share of this power, I think, as the Secretary himself pointed out last week, that this administration has no interest in having the President, himself, initiate that sort of action without congressional support.

It is only where you have an emergency situation that he must remain free to act without some form of appropriate congressional action.

Mr. FRASER. Mr. Findley?

PRESIDENT'S LEGAL AUTHORITY IN VIETNAM

Mr. FINDLEY. Mr. Stevenson, Mr. Fraser raised the question as to the extent of the President's legal authority to continue military action in Indochina.

Would it be fair to say that his authority is limited to military action required to effect the safe withdrawal of our remaining forces there?

Mr. STEVENSON. I think the President has also indicated that he inherited a war and that part of the withdrawal process involves the question of the ability of the Vietnamese to defend themselves.

Therefore, in determining this situation, he is concerned with, on the one hand, the safety of our troops; on the other hand, he is concerned with the situation of the country we are leaving.

Mr. FINDLEY. Isn't that somewhat fuzzed up by the repeal of the Tonkin resolution?

The repeal of the Tonkin resolution leaves in force, of course, the SEATO Treaty, but that treaty clearly states that military action will not ensue except first of all when a determination has been made that the country is under external attack and second, after that determination has been made and reported to Congress, subsequent congressional approval is secured.

Now, the Tonkin resolution is stripped away. And the SEATO Treaty is all that would remain, at least in my view, that would give the President any legal justification to use military force to get South Vietnam in a position to defend itself except to the extent that this is related to the safe withdrawal of our forces.

U.S. OBJECTIVES IN VIETNAM

Mr. STEVENSON. I think the two aspects of his policy are very closely related and, of course, the safety of our troops also involves the problem of the prisoners of war.

So, I don't think you can be that precise in segmenting out a part of the justification.

Here, again, I think it bears repetition that he has indicated that his intention is to terminate this involvement.

Mr. FRASER. Is it not true, Mr. Stevenson, that our involvement will end only after the President secures a specific objective?

The objective being to secure the South Vietnamese nation through the buildup of the capabilities of the South Vietnamese armed forces?

Mr. STEVENSON. I think I had better let the President speak for himself. I think he has stated what our objectives are.

Mr. FRASER. My point is that this specific objective is an objective that goes far beyond the safe withdrawal of American forces.

Mr. STEVENSON. It is combined with it. I think they are always mentioned together as part of the process of orderly liquidating of the situation that he was presented with when he came to office.

I think he has always linked the two things together.

VIEW OF THE NIXON DOCTRINE

Mr. FRASER. In your view, under the Nixon doctrine, would the President have the authority to commit air and sea support to Thailand without congressional authorization in the event of a Thai internal insurgency?

Mr. STEVENSON. Both the Secretary and I have made clear that we are only talking about independent Presidential action in the event of an emergency situation.

It is our clear intention to seek congressional action. Now, I really don't think it would be in the national interest for me to speculate with respect to what we might do in any particular country because you then have to consider what the treaty and other commitments are and the

nature of the emergency, whether or not it would permit the type of consultation which the administration would like to have.

So, I really would not like to comment with respect to any particular situation.

Mr. FRASER. It seems to me, Mr. Stevenson, from our point of view it is not enough that the President indicates that he would like to consult. We are trying to define the limitations on the President's authority.

The President is to be commended for any effort to consult. There is no reason to believe he would not consult. But we are dealing now with the question of Presidential authority or power under the Constitution.

In your judgment, would the President have the power to commit air and naval forces under the SEATO Treaty if he felt it would be be useful to do so?

MEANING OF "CONSTITUTIONAL PROCEDURES" IN SEATO TREATY

Mr. STEVENSON. The SEATO Treaty clearly provides that our obligation to act shall be implemented in accordance with our constitutional procedures.

Mr. FRASER. What do the constitutional procedures require?

Mr. STEVENSON. In that case I go back again to the statement that Secretary Rogers and I have both indicated, we feel this is an area where there should be joint action except in an emergency situation.

Mr. FRASER. Assume there is no emergency and the Congress does not act. Then do you think the President still has the authority to act?

Mr. STEVENSON. I think that is putting in a different way just what I have said.

I think no, where it is not an emergency situation that it is a matter of joint congressional and Presidential action.

Mr. FRASER. In other words, Congress would have to affirmatively act in order to give him that authority?

Mr. STEVENSON. That is correct. As I mentioned earlier, the way in which Congress acts is something else again. There are many different ways.

Mr. FRASER. Just one final question:

In your judgment, would an appropriation to support activities of our Armed Forces abroad constitute a ratification or an endorsement of the undertaking?

Mr. STEVENSON. I think it is hard to generalize. I think in some cases it could; in some other cases, you have had clearly just the opposite, an indication that they did not want to endorse certain types of action.

Mr. FRASER. For example, it was argued on the floor of the House in connection with the Vietnam appropriations that whatever one thought of the war, the troops were there, they were fighting and if you cut the funds off you endangered their lives.

Do you think that is a legitimate argument?

Mr. STEVENSON. I think it is a legitimate argument. I think that if that argument is made, however, it takes away from the other argument that you put forward earlier.

Clearly if you justify the appropriation on the basis of not affecting the safety of our troops in the field, then I am frank to say that it doesn't indicate approval of what is being done in the same sense

because clearly they are doing it because they want to protect the safety of the troops.

Mr. FRASER. In other words, when that argument is made——

Mr. STEVENSON. I think it weakens any ratificatory effect of congressional action.

Clearly, there may have been indications of disapproval of the initial policy but unwillingness to endanger our troops.

Mr. FRASER. Thank you.

Mr. Bingham, would you please take the Chair?

PROBLEMS OF COOPERATION AND CONSULTATION

Mr. BINGHAM (presiding). Gentlemen, I am sorry that I missed a good deal of this colloquy because of the votes we have been having. If there is some repetition in my questions, I apologize.

First of all, I would like to make a comment which perhaps others have made and I don't know whether you would care to respond to it, Mr. Stevenson, since you stress in a very admirable way the necessity of cooperation and consultation between the executive branch and the legislative branch but it does seem that whenever the crunch comes, whenever something is delicate, difficult, dangerous, and so on, the executive branch decides it is not wise to consult with the Congress and it does not consult with the Congress, at least not until the very last minute when it is more or less a matter of informing the leaders of what is to be done.

That was the case in the missile crisis, in the case of the Jordan crisis last year, in the case of the South Vietnamese move into Laos recently.

Having been in the executive branch, I know that there is a feeling on the part of many in the executive branch that the Congress is not to be trusted. But this does not exactly coincide with the stress in your statement and in many statements of the executive branch for the need for cooperation and full consultation.

Mr. STEVENSON. I would suggest that Secretary Rogers and I have gone beyond simply suggesting willingness to cooperate.

He indicated some ways that this might be made more effective, including proposal for periodic and regular briefings by the regional assistant secretaries so that you build up the information capability with respect to the particular area.

He also indicated our willingness to discuss further this suggestion of a possible joint committee which could be in a position to consult on an emergency basis.

So that I think it is not just a general indication of willingness but preparedness to sit down and try to work out some of the better procedures.

We don't necessarily feel this requires legislation.

IN SENSITIVE SITUATIONS NO CONSULTATION

Mr. BINGHAM. I don't think the problem is a lack of periodic and regular briefings.

Our cooperation is fine on that. In the normal course of things, I think we can get what information we need. But what appears to happen frequently is that when a crisis develops and when information

that is received or actions being taken are very sensitive, just when consultation ought to take place, it does not.

Another example I would give in addition to those already mentioned is the case of the activity concerning the Soviet possibility of the establishment of a Soviet naval station in Cuba earlier this year.

In spite of distinct efforts on the part of the Latin American Subcommittee of the Foreign Affairs Committee, we simply were not able to get the information about what was really going on.

I make that more by way of comment to illustrate the fact that we do feel, many of us feel, that more structured means of providing the Congress with information are needed.

I would like to explore a little further with you your concept of just what the power of the Congress is with respect to hostilities that are not declared.

POSITION ON DECLARATIONS OF WAR

The Constitution does provide that the Congress should have the power to declare war but in recent years it seems the declarations of war have more or less gone out of fashion. What is your concept of the corresponding authority that Congress has in the situation today where wars are more often undeclared than not?

Mr. STEVENSON. I have indicated our view that any assertion that because wars are not declared in most cases today that the Congress' power arising from that provision no longer exists is something that we do not accept.

We think that Congress' power to declare war has to be interpreted in the light of the present-day circumstances and that you, in fact, may have other ways today of Congress acting in this area rather than through a declaration of war because in many situations it is clearly felt that some other type of action will have the effect of limiting the conflict and is therefore desirable.

Therefore, there must be some other way of having Congress participate.

I think both the administration witnesses have indicated that this is an area of shared powers and that Congress has a very definite role and so does the President.

The problem is basically one of carrying out what was clearly the intention of the framers of the Constitution, of finding a way of reconciling and making these two powers, the powers of the respective branches, operate effectively and harmoniously.

Frankly, this is something that is really not for the courts of law but is for the political process to effectuate.

EXPOSITION OF THE BINGHAM RESOLUTION

Mr. BINGHAM. That is a very good statement. That is really a statement of what we, some of us at least on this subcommittee, are searching for, some way of providing a procedure that can give effect to what you refer to as shared power.

We do not get from the administration any specific proposals of how to provide some mechanism that would make sure that the Congress was in a position to exercise a part of that power.

I would like to call your attention to the fact that just yesterday I introduced a new resolution which is a modification of the resolution

that I had previously introduced and which eliminates the statement of conditions under which the President would be empowered to act in an emergency without a declaration of war.

I came to the conclusion after considerable thought and study of other resolutions and indeed of my own prior resolution that for many of the reasons you mention it is undesirable for the Congress to attempt to spell out those situations in which the President is authorized to move without a declaration of war.

It seems to me that the conditions are either too broad, in which case they are meaningless, or they are too restrictive, in which case they could be dangerous.

I also came to the conclusion some time ago that the 30-day limitation was an arbitrary and unwise limitation of time, again for some of the reasons that you have mentioned, that it might be difficult to determine when the 30 days began, and that Congress should not be forced into taking action at a particular time.

So, this led me to the proposal that either House of the Congress could at any point in the process express disapproval of the continuing use of foreign troops and that the President would be directed to wind up the authority.

I mention that because I think that quite a few of the comments that you have made in your statement don't deal with this type of proposal.

You have emphasized, Mr. Kauper, that any provision to explicitly authorize the Congress to terminate the President's authority to commit the Armed Forces is unnecessary.

That would seem to imply that the Congress has that authority.

Indeed, your suggestion that there is a shared element in the power between the Congress and the President in this situation would seem to assume that the Congress should be at least tacitly in approval or in support of what the President is doing.

What I am suggesting is that if that at least tacit support is discontinued or there is indication that it does not exist by an unfavorable resolution by either House, then the assumption of a shared responsibility and shared power comes to an end and the engagement should be wound up.

Would you care to comment on that?

PROBLEM OF "ONE-HOUSE VETO" BILLS

Mr. KAUPER. What you are talking about is, I gather, still essentially the form of what you might call the one-house veto, which appears in your present bill.

Mr. BINGHAM. Yes.

Mr. KAUPER. The one-house veto, as I think you may know, has always presented us with some difficulty.

The analogy which is always drawn, of course, is the analogy to the executive reorganization acts.

I am not sure here we are talking about quite the same thing in terms of what might be characterized as reverse legislation. You do not have in the situation you are hypothesizing: the President's coming to Congress and asking for legislation which you then in essence disapprove of.

But I think one of the more serious difficulties with the idea of the one-house veto is that there are some circumstances where I think at least we can envision you would be using what appears to be the authority of one house to negate a constitutional authority which is clearly the President's.

If I might use an example, and this may not be quite the kind of thing you are thinking about, the power of the President to repel an attack, it seems to me, is not something that Congress has delegated to him or indeed that Congress need approve. To terminate, just hypothetically now, the President's action in repelling an attack with a one-house veto arrangement, it seems to me, does not even say you are terminating pursuant to what I would characterize at least as law.

Now, I think part of the problem is that in these conditions, there are variants. There are some where the President has less power than others. We are lumping them together in one bundle of wax here.

CONSTITUTIONAL INVALIDITY OF ONE-HOUSE VETO

Mr. BINGHAM. If I may interrupt, I notice this in your statement. You say that congressional action would either be constitutionally valid or it would not. But where does that leave us?

That leaves us with a very unsatisfactory situation at the time you have a confrontation which can't be determined readily. What we are trying to do is through some device, some ingenuity, to spell out in advance the situations when the veto by the Congress should be effective.

Now, I would have no objection to trying to spell out those situations where the veto might be constitutionally invalid.

But we keep running into the notion that we can't move now because the circumstances are not so foreseeable, yet, this leaves us with the problem that in a time when there was a difference of opinion between the President and the Congress we would not know how to proceed.

Mr. KAUPER. I think one would normally proceed as attempts have been made to proceed at the present time, that is, through the normal legislative process. I think to try to build in a one-house arrangement, and what I am addressing myself now to is the one-house arrangement, is to attempt to curtail some kind of authority which, and I gather what you are doing in your bill by eliminating the conditions you are neither recognizing nor denying the propriety of the authority, but I think you are doing it with the one-house veto arrangement in a way where perhaps we can envision a circumstance where legislation might actually in fact be fully operative as law.

I don't think a one-house veto would be that effective. That is part of the problem I am having.

"TACIT APPROVAL" OF CONGRESS

Mr. BINGHAM. I don't want to pursue this indefinitely.

I know that you have given a great deal of time already but let me suggest this to you:

If, as I take it, you are inclined to agree that the normal situation is that the President is proceeding with at least the tacit approval of the Congress, and that means the tacit approval of both Houses of the Congress, if there is to be shared responsibility and if the Congress

has not in fact acted with an explicit authorization, then must it not follow that the congressional role is a kind of tacit approval?

Mr. KAUPER. I am not sure that necessarily is so.

Obviously, there have been cases—and I think you refer in the statement to places—where there have been tacit acquiescences; maybe that is a good word to use.

But, I think in many circumstances what we are talking about is something either more or less than that.

There may be circumstances where what we are talking about is the President acting, where I think perhaps we would all agree he need not have the advance approval of Congress.

I am thinking again of the repelling of a sudden attack. There may be other circumstances where, I think we would all agree, if the President decided to invade some country—we are not talking about a crisis situation—where he would presumably need to consult. I am not sure in the first case that a one-house veto would be effective to negate the President's authority.

I am not sure in the second, if congressional authorization were in fact necessary, that that would suffice to give it.

That is the problem.

POWER OF PURSE IS CLUMSY TOOL OF CONGRESS

Mr. BINGHAM. It leaves us in a very unsatisfactory situation because it really requires Congress to use the very clumsy tool of the fiscal power to try to influence the course of these events and I think that probably everyone would agree that this is not a very satisfactory way for the Congress to act.

The fact that the Congress has that power is an indication of its underlying responsibility and its underlying authority.

To attempt to direct the course of military action through the use of the fiscal power is a very unsatisfactory way of doing business.

Would you not agree?

Mr. KAUPER. Again, I think it depends on the circumstances you are talking about.

Yes, there may be some circumstances where it is. There may be circumstances when we are not depending on what kind of time you are talking about, and so on.

Mr. BINGHAM. I want to thank you both very much on behalf of the subcommittee for your time and your very thoughtful and interesting testimony.

The subcommittee stands adjourned.

(Whereupon at 5 p.m., the subcommittee adjourned, subject to call of the Chair.)

ADDITIONAL STATEMENTS BY MEMBERS OF CONGRESS

STATEMENT OF HON. THADDEUS J. DULSKI OF NEW YORK

Mr. Chairman, I commend you for calling these hearings on pending legislation to clarify the war powers of Congress and the President.

For the record, I am Thaddeus J. Dulski, a Representative from the 41st District of New York.

I am the cosponsor of House Joint Resolution 275 which is before your subcommittee. I also am a cosponsor of House Joint Resolution 664. The texts vary somewhat from each other and from other pending measures. However, the intent is basically the same, and that is really what matters.

Clarification of the war powers of the Congress and the President is long overdue. Congress has allowed the Chief Executive to assume what amounts virtually to a dictatorial role to which he expects the Congress to be subservient.

This is not the way it was meant by the framers of the Constitution.

I certainly understand that the Chief Executive cannot be so hamstrung that he cannot react in our Nation's interest in a time of true and critical national emergency.

But giving him that authority should not mean he can overlook explaining his actions promptly to the citizenry through its elected Representatives in Congress.

I recognize that there may be elements of national security involved and I don't expect to be privy personally to all the details in each instance. I do, however, believe and expect that Members of the appropriate committees in the House and Senate not only are entitled to be but must be fully informed on these matters, preferably before—and absolutely as soon as possible after—the emergency action.

There is no desire on my part to burden further the awesome responsibilities of the Presidency. Neither do I intend to stand idly by while would-be kingmakers chip away at the role and responsibility of the Congress.

Mr. Chairman, there is no subject which is causing greater concern to our citizenry than our endless involvement in the Far East. Congress sought to restrict further involvement but the administration has skirted the congressional directive by falling back on technical loopholes.

The need is clear and urgent for a clarification of war powers for our Nation. I hope your subcommittee will act promptly to make recommendations to the full committee and, in turn, to the House for action.

As part of my remarks, I ask permission to include the full text of a statement I made at the time I introduced my bill last February. I also include the text of a very timely editorial from my home city newspaper, the Buffalo Evening News.

War Powers of Congress and the President Need To Be Spelled out

Mr. Dulski. Mr. Speaker, I am today introducing legislation aimed at spelling out the war powers of the Congress and the President.

I have been concerned for some time about the progress of events in Indochina. I am particularly disturbed about the current heavily censored activities which appear to skirt the intent of congressional limitations on U.S. combat participation.

Congress already has restricted combat activities in Indochina, but quite apparently we did not go far enough.

To simply restrict use of ground troops in specified areas leaves a loophole and an opportunity for technically different operations which still result in comparable U.S. participation in violation of congressional intent.

Over most of the years of our Nation's history, the responsibility for putting our troops into combat has been under the control and supervision of the Congress. However, in recent years, Chief Executives have been taking the initiative, moving on their own and then belatedly letting Congress know how they have committed U.S. manpower.

It is my firm conviction that the Chief Executive should have the power to commit our troops to combat only when our Nation is under attack or in clear danger of attack.

I recognize that there can be extraordinary and emergency circumstances that could arise demanding near-instantaneous reaction on the part of the Chief Executive. However, this is not ordinarily the case because usually there are sufficient warnings and intelligence on potential dangers to our national security.

If, however, such extraordinary and emergency circumstances should arise, then the President should be required to inform the Congress immediately in detail, as both the circumstances and to the extent of the reaction.

Our forefathers, in writing the United States Constitution, made it clear that the power to declare war rests with Congress. I believe that Congress needs to reaffirm this power through legislative action in spelling out in the greatest detail possible exactly the circumstances and procedures under which a Chief Executive can act.

In the present circumstances in Indochina it is quite evident and greatly disturbing to me that the administration has not consulted with the Congress about the commitments that already have been made.

Indeed, the manner in which the current Far East circumstances have developed raises real doubt in my mind whether the preliminary facts even were made available to our Chief Executive before it was too late for him to reverse U.S. participation.

I am not a member of the Foreign Affairs Committee and therefore would not expect to be kept informed in continuing detail on these matters. But I do feel the integrity of the Members of Congress who properly need and are entitled to be informed is being questioned by the disturbing reluctance of the administration to inform them on essential details.

With regard to Indochina, I feel we have two prime concerns as we withdraw in orderly fashion. First, we must work for the safe return of the prisoners of war, and second, we must work for the safe return of all remaining U.S. Forces.

The joint resolution which I have introduced in the House seeks to spell out in careful detail the war powers of the Congress and the President.

The need for this legislation is more evident today than when I began studying and analyzing the matter several weeks ago. I am communicating my views to the chairman of the Committee on Foreign Affairs.

[Editorial from the Buffalo (N.Y.) Evening News, May 13, 1971]

Clarifying the War Power

Ever since President Johnson began the great escalation in Vietnam, with the Tonkin Gulf resolution providing the main cover of legality, a growing cross-section of congressional leaders has been seething in frustration over the Chief Executive's assumption of a warmaking power which the Founding Fathers intended to repose in Congress.

While the effort to retrieve some semblance of this lost, strayed or stolen power has found its greatest support among Senate doves—with New York's Senator Jacob Javits coming to the fore in recent months as the most articulate exponent—this movement is now immeasurably enhanced by the support of a leading southern hawk, Senator John Stennis (Democrat of Mississippi).

Actually, the aggrandizement of the President at the expense of Congress in this vital warmaking area is part of a generations-long pattern which, in the thermonuclear age, could not possibly be reversed in any ultimate sense. Obviously, we cannot have 531 thumbs on the nuclear button; the President must be free to confront any instant challenge to our survival with whatever emergency actions he deems necessary.

But this is not the kind of challenge we faced in Korea or now face in Vietnam, Cambodia and Laos, where this nation has waged prolonged war under presidential direction without either a congressional war declaration or specific congressional regulation of its conduct. Not only that, but the President takes it for granted that he alone has the power to wind the war up or down, widen it or narrow it, continue it or end it—just so long as Congress keeps supplying the money and refrains from imposing any absolute restrictions.

The Javits resolution, which Senator Stennis' proposal seems to echo in most major respects, would authorize the President to commit our Armed Forces under four specific conditions: (1) To repel a sudden attack on the United States; (2) to repel an attack against U.S. Armed Forces on the high seas or abroad; (3) to protect U.S. lives abroad; and (4) to comply with a specific treaty or other formal national commitment.

But whenever such hostilities have been initiated, the President would be required to give Congress a full and prompt account of the circumstances, and, in the absence of a declaration of war, he would be prohibited from sustaining the hostilities beyond 30 days except as Congress may provide by law. To make sure that the whole Congress could act on such war-sustaining legislation within the 30 days, the resolution gives it a special priority guaranteeing it prompt committee clearance and a vote in each house within three days thereafter.

The only point on which Senator Stennis seems to differ with this approach is that he would explicitly exclude any application to the Indochina war. On this point, Senator Javits said in his interview with the News this week that his proposal, while not retroactive and therefore not intended to apply in Vietnam, nevertheless could apply there, too, if hostilities involving American troops should be renewed after they had ceased. But that is a relative quibble compared with the broad constitutional purpose of redefining the war power in a context relevant to this dangerous age.

We think the Javits resolution does accomplish this in a most effective way, and we are impressed by the caliber of the many constitutional authorities who agree that it will help restore the balance intended by the Founding Fathers. The fact that the President must have untrammeled authority to act in bona fide emergencies does not, in our judgment, justify the waging of prolonged hostilities in the absence of either a formal declaration of war or a specific act of Congress. It is time that the basic constitutional responsibility for keeping this nation at war be put, as Senator Stennis says, "where it belongs, on the people's representatives."

STATEMENT OF HON. JACK EDWARDS OF ALABAMA

Mr. Chairman, members of the subcommittee, I have come before you today to express my support and keen interest in the very timely and needed enactment of House Joint Resolution 664.

One very important necessity has emerged from our experience in Vietnam—the necessity of making sure this Nation avoids any future Vietnams.

The U.S. combat role in Vietnam is coming slowly, but steadily, to an end. At the same time, the debate over how we can best avoid future Vietnams is just beginning.

Obviously, the American public is sick and tired of going into wars which ultimately end in a stalemate such as we have been involved with in Korea, and now, Vietnam. We have no business sending our troops thousands of miles away and spending billions of dollars of hard-earned American tax money to fight a battle that doesn't have total victory as a goal.

The best way to avoid such wars is to profit from the lessons of Korea and Vietnam before it is too late.

One way to avert a repetition of Korea and Vietnam is to make sure we don't go to war accidentally or by Presidential decision alone.

That is the vital purpose of House Joint Resolution 664 of which I am a cosponsor—to provide a built-in, guaranteed, legal provision that, whoever the President is, he will not have free rein to place this country into the position it is in today as a result of his unilateral decision.

Whoever the President is, he must not put this nation into another war without explicit congressional approval.

Congress cannot amend the President's powers as Commander in Chief by resolution. Once we are in a war then Congress should not interfere with the President's constitutional power to conduct the war. But, we shouldn't be in a war in the first place if Congress hasn't declared war.

It is for these reasons which I have spelled out here that I strongly urge the subcommittee to render full support and approval of House Joint Resolution 664.

STATEMENT OF HON. ALBERT H. QUIE OF MINNESOTA

Mr. Chairman, the controversy which has developed because of the war in Vietnam has affected virtually every segment of American society. Fresh cries of dissent greeted President Nixon's decision to intervene in Cambodia, with protests marked by street demonstrations, student dissent, and confrontations with civil and military authorities occurring in every part of the country. At the same time, vigorous support of the President's foreign policy, climaxed by counter-demonstrations have resulted in a polarization of attitudes.

As scholars, students, political leaders, and the public begin to have second thoughts relative to the powers of the President, it is in order for us to examine the respective war powers of the Congress and the President and to view those which have actually developed in practice.

The first issue concerning initial commitment is what authority does the President have, acting as Commander in Chief, to commit the Armed Forces to combat abroad.

Constitutional practice in the 18th and 19th centuries supported a presidential role in the commitment of troops to hostilities abroad, but only in a minor way. Though there were a large number of exercises of presidential authority, most were relatively minor actions for the protection of nationals, actions directed at pirates, or reprisals for alleged breach of international law.

As America's position of relative isolation began to change at the end of the 19th century, the Presidents began to assume an increasingly powerful role. Twentieth-century instances of Presidential commitment of the Armed Forces to combat abroad include President McKinley's commitment of several thousand troops to the international army which rescued Western nationals during the Boxer Rebellion, President Wilson's arming of American merchantmen with instructions to fire on sight after Germany's resumption of unrestricted warfare in 1917, President Franklin Roosevelt's Atlantic war against the Axis prior to the U.S. entry into World War II, President Truman's commitment of a quarter of a million American men to the Korean war, President Eisenhower's landing of the Marines in Lebanon, and his involvement of the U.S. Fleet in the straits of Taiwan, President Kennedy's use of American naval and air forces in the Cuban missile crisis, and President Johnson's commitment of Marines to the Dominican Republic.

Therefore, history has demonstrated that there are situations in which military forces must be deployed in the absence of a declaration of war.

These cases arise in circumstances which require combat actions but which are in contemporary conditions—undesirable to enact a declaration of war.

Moreover, it has long been recognized that there are conditions in which there is not enough time, or room of movement for a congressional declaration of war before military hostilities must be undertaken.

Therefore, the heart of the problem concerns the power of the President to initiate and maintain hostilities by the use of Armed Forces in the absence of a declaration of war.

It is of profound distress to many that the role of the Congress in foreign relations in the last 70 years has greatly declined, as Congress has not assumed the leadership role in many crisis situations. The courts, though never ruling directly on the power of the President to involve the Nation in situations abroad likely to result in war, limited or otherwise, seemingly have "served more to enlarge the Presidential prerogative over foreign affairs than to restrain it. For example, in *Martin* v. *Mott* the Supreme Court concluded that the President was empowered to act not only in cases of actual invasion, but also "When there was imminent danger of invasion" and "imminent danger" was held to be a fact to be determined by the President.

The President enjoys certain discretionary authority: but it is the discretionary authority of an executive. He conducts the foreign policy of the country, while the Congress passes resolutions and ratifies treaties relative to that policy. The President, however, does not possess the authority to declare war. This is a power which the Constitution granted to the Congress under our system of checks and balances.

In article I, section 8 of the Constitution the Congress is given authority to raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years; provide for the common defense; and to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water.

I believe that this authority implies that Congress also has the authority to prohibit Presidential commitment of regular combat units to sustain hostilities abroad if war has not been declared.

But when congressional authorization is necessary, what form should it take? Though the Constitution speaks of congressional power "to declare war," constitutional scholars are in agreement that congressional authorization does not require a formal declaration of war. The purpose of the provision is to insure congressional consideration and authorization of decisions to commit the United States to major hostilities abroad. It would both elevate form over substance and unduly restrict congressional flexibility to require a formal declaration of war as the only method of congressional authorization.

Though reasons supporting executive authority are still relevant to such decisions, the profound effects for international relations and the grave risk of escalation and unnecessary suffering suggest a strong congressional competence in such decisions.

Abraham Lincoln, while in Congress once said, "Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose." He went on to say that, "Kings have always been involving and impoverishing their people in wars, pretending, generally, if not always that the good of the people was the object. This our (constitutional) convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution so that no one man should hold the power of bringing oppression upon us.

But your view destroys the whole matter, and places our President where kings have always stood."

The Congress has done very little to adapt its declaration of war power, or its other constitutionally specified war powers to deal with the situations which have evolved from historical experiences. It has reached the point where any effort simply to check the expansion of Presidential power is regarded by some defenders of the Presidency as an encroachment on the office of the President. Many advocates of Presidential prerogative in the field of war and foreign policy seem at times to be arguing that the President's powers as Commander in Chief are what the President alone defines them to be.

What is needed is new legislation which will define the rules and procedures to be followed in circumstances where military hostilities may be initiated by the Commander in Chief in the absence of a declaration of war. This bill will not affect the war in Vietnam, but instead will permit the Congress to decide how it should be involved in policy formation before any similar military hostility again arises.

I believe that H.R. 5709 will help to meet this need. In essence, the President's control over decisions to use force abroad is a perfectly natural and explicit development, but it is not one which has been required by national self-interest. This is not to say that the President should surrender his power over the day-to-day conduct of foreign relations or relinquish his role as a forceful external leader. It is to say that Congress should have a voice in shaping foreign policies and a decisive voice on whether the United States will initiate the use of force abroad.

I believe H.R. 5709 will accomplish this. The constitutional right of the Congress to pass this bill is stated in its specific war powers in article 1, section 8, including the power to declare war. Congress has the authority and the precedents for asserting its powers to declare war which must include the power to end war. Because the Congress has not asserted itself in the past in Armed Forces involvement in military hostilities in the absence of a declaration of war, it has fallen upon the Commander in Chief to exercise his executive discretion on an ad hoc, case-by-case basis.

My bill gives full allowances to the President in his executive capacity as Commander in Chief. But most important, this bill asserts congressional responsibility related to declaring war as stated by the Constitution and as expected and demanded by the Nation. Under my bill Congress would specify the four classic cases in which the President, for a limited amount of time may use the Armed Forces in military hostilities in the absence of a declaration of war.

First, to repulse a sudden attack against the United States, its territories and possessions;

Second, to repulse an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory;

Third, to protect the lives and property, as may be required of U.S. nationals abroad.

Fourth, to comply with a national commitment affirmatively undertaken by Congress and the President.

Under H.R. 5709, even the 30-day period may be shortened by joint resolution of Congress. Also, the bill contains provisions enabling action to take place in Congress within 30 days.

The danger of extended debate or filibuster is precluded under the terms of the bill because the bill or joint resolution either terminating

or extending the military hostilities, after being cosponsored by one-third of the membership in either House, would be considered reported to the floor no later than 1 day following its introduction.

It would be possible, however, for the members to determine by a yea or nay vote that the committee would take longer than 1 day in its consideration of the bill or joint resolution.

Any bill or joint resolution reported would become the pending business and would be voted on within 3 days after such reporting. Similar provisions would cover consideration by the other House of Congress so as to assure expeditious consideration.

The bill or resolution for the extension of hostilities could conceivably contain a limitation on the time period for continued actions.

The bill provides that such military hostilities, in the absence of a declaration of war, may not be sustained beyond 30 days from the day they were initiated, "unless affirmative legislative action is taken by the Congress to sustain such action beyond 30 days."

Under my bill, the Congress would not have to be committed initially to any action which the President might take. After 30 days there would be no authority for the Commander in Chief to persist unless the Congress decided that it wanted him to do so.

The present high state of Presidential prerogative has evolved naturally out of a set of historical and institutional factors which enabled the President to respond to contemporary pressures more easily than Congress. If Congress has the will, however, it too can meet the demands of modern foreign policymaking. While certain changes in institutional structure will be necessary, the critical factor will be the development of a congressional willingness to act quickly and wisely on vital issues and to use its existing power to make its influence felt.

STATEMENT OF HON. CLAUDE PEPPER OF FLORIDA

Mr. Chairman, I am pleased to join my distinguished colleague from Florida, Mr. Chappell, in support of his resolution, House Joint Resolution 644, to clarify the war powers of the President and the Congress.

I think this resolution touches one of the most critical issues facing the American people today and I am pleased to be one of the cosponsors.

It seems to me unthinkable that anyone would ever assume that any of the Founding Fathers, when they were writing the U.S. Constitution, would ever in their wildest imagination have contemplated the possibility that the President of the United States would ever assume that he had the power to commit more than one-half million men of the armed services of the United States to a protracted war costing tens of billions of dollars and lasting over many years on the other side of the world. Yet this is what has happened and the result has been a serious division of our country and a weakening of our country at home and in the world.

Thus, it seems to me now that we have got to come to some sort of delineation of the power and responsibility of the President under the Constitution and the power and responsibility of the Congress under that supreme document.

It is clearly evident to me from the central and concise language of the Constitution that, while the President has authority to move the Armed Forces whenever he wants to, that he has the clear authority and the duty to take promptly such steps as may be necessary to defend the United States against an attack, but beyond that, beyond meeting an emergency situation and repelling an attack or protecting the lives and the liberty and property of the citizens of the United States from an immediate threat, it is clear that the President does not have the power to commit the United States, to commit the Armed Forces of the United States, to a protracted war on foreign soil.

It cannot be said upon a reasonable constitutional theory that the Presidential prerogative allows him to send an army of over one-half million men to the other side of the world and to engage in what everyone knows is a war, without a declaration of the Congress, without a commitment on the part of the Congress to that conflict. The prerogatives of the Chief Magistrate of our land and of the Commander in Chief of our Armed Forces very clearly, under the terms of our Constitution, do not include the power to initiate war or to involve the country without the consent of the Congress in a war.

Nevertheless, we find ourselves in a situation where we seem to have no recourse against the assertion of Presidential powers except to cut off the funds necessary to maintain the U.S. Armed Forces committed to this undeclared war. This is certainly not a satisfactory solution to this problem.

We are challenged, therefore, to devise other legislative remedies which will spell out the powers of the Commander in Chief and specify the limitations upon the exercise of those powers. I am confident that this distinguished subcommittee is equal to this challenge and I commend to you the initiative embodied in House Joint Resolution 644.

I must add that, in the meantime, I feel obligated to use what power I have as a Member of the Congress, with a vote on military appropriations and other appropriate legislation, to seek to bring the current abuse of the war-making power to an end. I urge the subcommittee, therefore, to exercise all deliberate speed in providing a more appropriate remedy for the tragic and highly unconstitutional situation in which we find ourselves.

I thank you.

STATEMENT OF HON. ROBERT L. F. SIKES OF FLORIDA

Mr. Chairman, I appear today in support of House Joint Resolution 644 which I am cosponsoring, relating to the war power of Congress. The Constitution assigns only to Congress the awesome responsibility of a declaration of war, yet we find ourselves heavily engaged for the second time in a generation in a war by presidential action and not by act of Congress. It is entirely possible that much of the distaste which has become associated with our current involvement in Indochina arises from the fact that the representatives of the people, speaking for the people, did not in fact commit us to this engagement.

War in all its aspects is a grievous and destructive business. There must be national will and spirit which supports the war and is convinced of its justification. The current way has been fought without a genuine effort to acquaint the American people with its justification or its requirements. There should be no other wars which do not fully reflect the spirit and determination of the American people to see a cause through to a victorious end.

The Tonkin resolution came before this body after we were in fact committed in Indochina. It gave the President broad authority to send American troops into battle on foreign soil, but it was not a declaration of war. We have good cause for our involvement in Indochina, but we backed into it rather than facing up to all aspects of the responsibility and the magnitude of the task.

A President should not have power unilaterally to commit our Nation to war. This is a responsibility which belongs to the Congress and the President should take the Congress into his confidence in all aspects of an international problem before asking such a commitment. With the adoption of the resolution now before us, the Congress will again be required to accept its own responsibility and, as spokesmen for the people, to commit our Nation. If the resolution accomplished nothing else but this, it would be worthy. But it does more.

It serves notice on the entire world that the American policy of nonaggression is written into the law of the land. The resolution directs that no President may ever send American forces to a foreign land for purposes of armed conflict without having to stand before the Congress and the world and justify his actions.

This resolution, if adopted, will be unique in the universe. I know of no other nation which has either the strength or the courage to act as we now have the opportunity to act by adoption of this resolution. It will support, by congressional action, the policies which have been laid down by nearly every administration for almost 200 years.

This resolution will serve notice on the enemies of freedom that America and America alone has adopted, and written into law, a provision preventing any President at any time from engaging in war without congressional action. It is entirely possible that this will prevent reckless adventures in future years. It will place the responsibility of war or peace on the Congress where rightly it should rest,

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and it will serve notice on the world that the United States truly seeks peace for mankind.

Some critics will argue that the resolution places undue restraints on the President's power to defend the Nation. I disagree with the critics on this point. It allows the President the same freedom to act as he now has. There is nothing in the resolution which prohibits the President from instant reaction to a threat. The only restriction on the President is that he would be required to bring his rationale before the Congress within 30 days of his action and to justify his action. Some might argue that the Congress cannot act with sufficient dispatch to grant a President's request that troops be allowed to remain in a given situation. Those who argue this point must somehow be overlooking the events of December 1941 when Congress acted within hours, not days.

This resolution will place the Congress in its proper role and will serve notice on the world that American Presidents, while restricted from reckless adventures, may act within minutes to meet aggression wherever it appears.

Mr. Chairman, I sincerely hope that your distinguished committee will be able to act favorably on this measure and, I want to thank you for the opportunity of appearing before you today.

STATEMENTS SUBMITTED FOR THE HEARING RECORD

STATEMENT BY PROF. JOHN NORTON MOORE, THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA.

Thank you for the invitation to submit a brief statement for the record supplementing my testimony last June concerning the constitutional aspects of the role of Congress and the President in the use of the Armed Forces abroad. In responding to this opportunity I would like to present three points for your consideration.

First, in testifying before the subcommittee last June I discussed seven principal issues in defining the congressional and presidential roles. A complete analysis of the range of constitutional issues in the use of the Armed Forces abroad, however, would require discussion of additional issues. Since failure to focus on the full range of these issues is a potent source of confusion about the war powers it seems important that the full range be articulated for the record. The full range of issues includes:

I. National commitments to use the Armed Forces abroad:
   (*a*) What authority does the President have, acting on his own, to commit the Nation to a contingent future use of the Armed Forces?
   (*b*) What authority does Congress have to limit presidential authority to commit the Nation to a contingent future use of the Armed Forces?
   (*c*) When, if at all, are national commitments for contingent future use of the Armed Forces self-executing without subsequent authorization?

II. The deployment of the Armed Forces abroad:
   (*a*) What authority does the President have, acting on his own, to deploy the Armed Forces abroad?
   (*b*) What authority does Congress have to limit presidential authority to deploy the Armed Forces abroad?

III. The commitment of the Armed Forces to military hostilities:
   (*a*) What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities?
   (*b*) When congressional authorization is necessary, what form should it take?
   (*c*) What authority does Congress have to limit presidential authority to commit the Armed Forces to military hostilities?

IV. The conduct of hostilities:
   (*a*) What authority does the President have, acting on his own, to make command decisions incident to the conduct of a constitutionally authorized conflict?
   (*b*) What authority does Congress have to limit command options incident to the conduct of a constitutionally authorized conflict?

V. The termination of hostilities:
   (*a*) What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?
   (*b*) What authority does Congress have to require termination of hostilities?
   (*c*) When Congress terminates hostilities, what form should it take?

The hearings conducted by your subcommittee are an historic step in clarifying the relationship between Congress and the President throughout this range of issues. The hearings have also demonstrated a need to upgrade the congressional role in war-peace decisions. The challenge facing Congress is how to vitalize this congressional role without impinging on areas where constitutional authority is properly entrusted to the President. In meeting this challenge it would be a mistake to simply react against past congressional and presidential inadequacies by sweeping legislation which fails to make the difficult distinctions that are inherent

in the full range of issues. The solution is not a legislative victory for the views of either Pacificus or Helvidius but is instead the far more difficult quest for reasonable lines which will optimize the strengths of both Congress and the Executive.

Second, because of the need to upgrade congressional involvement in decisions to commit the Armed Forces to hostilities abroad and to encourage greater cooperation between Congress and the President on major war-peace issues it seems appropriate and useful to require a reporting requirement for presidential commitments of the Armed Forces abroad. In this respect the reporting requirement contained in H.J. Res. 1 seems a useful model and I support it. On the other hand, efforts to limit presidential authority by precise advance delimitation of the independent authority of the President, such as those contained in S. 731, H.J. Res. 431, H.R. 5709, H.R. 4763, and H.R. 6940 run a dual risk of unconstitutionality and impracticality. For the reasons set out in my testimony before the Senate Foreign Relations Committee on April 26, 1971, a copy of which I enclose, I would oppose any such efforts to specifically delimit presidential authority in advance. If any such substantive limits were to be placed on presidential authority it would be far preferable that they be developed in quantitative terms based on the size of the force committed to combat than that they be developed in terms of overly neat specification of the purposes for which such forces can be committed. For example, an upper limit for independent presidential authority to commit the Armed Forces to military hostilities of commitments involving 25,000 or more troops would seem far more responsive to the constitutional purpose in division of authority between the President and Congress than the detailed specification of purposes contained in S. 731 and H.R. 6940. Such a limit would roughly separate the major and sustained hostilities constitutionally requiring congressional authorization from those which may be taken on the independent authority of the President. It would also include all of the foreign wars in which U.S. forces have suffered sustained major casualties while excluding the great bulk of instances in which historically the Armed Forces have been committed abroad on presidential authority. In addition, such a quantitative limit would not require that all possible use of force situations be anticipated in advance.

Third, in view of the importance of the issue it may be useful to add a few words to my earlier testimony on the authority to require termination of hostilities. There is little doubt that hostilities may be constitutionally terminated by the President acting pursuant to his powers as Commander in Chief and as Chief Representative of the Nation in foreign affairs.[1] Similarly, it is clear that hostilities may be terminated by the President and the Senate acting together pursuant to the treaty power. The record of the Constitutional Convention suggests that the framers probably had the treaty power in mind when they adverted to the power to make peace.[2] Moreover, Article VI of the Constitution provides that treaties made "under the Authority of the United States, shall be the supreme law of the land * * *." Beyond these two modalities of termination there is somewhat greater doubt about the constitutional structure, and particularly the extent of congressional power, with respect to termination of U.S. participation in hostilities abroad.

On the one hand, the Articles of Confederation assigned Congress the power to determine "on peace" as well as on war. Yet at the Constitutional Convention a motion by Mr. Butler "to give the legislature [the] power of peace, as they were to have that of war," failed of adoption. The remarks of Mr. Gerry who recorded the motion suggest that the delegates expected that the Senate rather than Congress would make decisions "on peace," probably through the treaty power which was the usual technique for concluding formally declared wars.[3] In addition, there is apparently no instance in the Nation's history in which Congress has compelled termination of U.S. engagement in active hostilities abroad over the President's objection. These factors have created expectations in at least one constitutional scholar that Congress has no power to terminate hostilities over the objection of the President. In a course of lectures delivered at the University of Pennsylvania School of Law and revised into treatise form in 1889, Prof. J. I. C. Hare wrote:

"Take, for instance, the case of a war which Congress thinks unnecessary or unjust, and wishes to close on terms that the enemy are willing to accept. Still, it

[1] See E. Corwin, "The President: Office and Powers 1787-1957," 259 (1957).

[2] See Corwin, *The Power of Congress to Declare Peace*, 18 MICH. L. REV. 669 (1920).

[3] See *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 477 (Ohio University Press) (1966). Corwin points out that another argument made against Mr. Butler's motion was that "it should be more easy to get out of war than into it." See Corwin, *supra* note 2 at 669. This suggests that the framers may have been more concerned with a hawkish Congress refusing to accept reasonable terms than a dovish Congress seeking to terminate hostilities over the objection of the President.

is the right of the President, and not of Congress, to determine whether the terms are advantageous, and if he refuses to make peace, the war must go on. Under such circumstances it would clearly be the duty of Parliament to withhold the supplies necessary for carrying on the war, because such a vote on their part would produce a change of ministry, followed by the return of peace; but as a corresponding action on the part of Congress will not lead to a cessation of hostilities, it is as clearly their duty to provide the means for prosecuting the contest with effect and bringing it to an honorable termination." [4]

On the other hand, Congress has a number of powers which suggest a broader role in termination decisions than is indicated by Professor Hare. These include the powers "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make rules for the Government and regulation of the land and naval forces," and to serve as the only source of authorization for treasury appropriations. And in the case of support of the Army the Constitution specifically provides that such appropriations may not be for a longer term than 2 years.[5] In addition, it seems probable that Congress retains the power to repeal any legislation authorizing major hostilities abroad and that to the extent that constitutional authority is based on such legislation it may be withdrawn by a repeal clearly intended to withdraw authority. This, in fact, seems to have been the principal basis for congressional action in the two instances in our history in which Congress recognized termination of hostilities. The first of these was a declaratory resolution establishing a state of technical peace with Germany following World War I.[6] Although an earlier effort to recognize termination of hostilities had failed when President Wilson vetoed it, in 1921 President Harding called for and joined in such a resolution. At the time, however, actual hostilities had been over for several years and the principal legal effect of the resolution was the repeal of domestic emergency legislation enacted during the war. Similarly, in 1951 President Truman requested and joined in legislation revoking the 1941 declaration of war against Germany.[7] As with the World War I legislation actual hostilities had long been ended. Since these instances did not involve congressional termination of actual hostilities over the objections of the President they have only limited precedential value. They do, however, suggest that the proper modality for congressional termination would be formal legislation which may be vetoed by the President and presumably the veto of which may also be overriden by Congress. This conclusion is also given some support by the case of *Ludecke* v. *Watkins*,[8] in which Mr. Justice Frankfurter, writing for the Court, stated in dictum that: " 'The state of war' may be terminated by treaty or *legislation* or Presidential proclamation." [9] The case, however, presented the narrow issue of the power of the President to deport enemy aliens under the provisions of the Alien Enemy Act of 1798 after actual hostilities had ceased but before the state of war had been officially terminated by either Congress or the President. As such it does not provide a focused judgment that legislation is an equivalent route to the treaty power or presidential proclamation in decisions to terminate actual hostilities abroad.

Policy considerations inherent in the functional strengths and weaknesses of Congress and the President suggest that Congress should have substantial power in termination decisions. Termination decisions do not characteristically require immediate decisions and in general the kinds of goals thinking which they require do not require extensive access to secret documents or detailed information about the conduct of hostilities. In addition, in recommending congressional and presidential roles in the full range of use of force decisions a stronger congressional termination power may enable greater independent presidential authority in deployment and commitment decisions. On the other hand, a functional case can also be made for presidential participation in termination decisions. If detailed information on the conduct of hostilities is not critical in making termination decisions it is certainly highly useful in assessing the costs of alternative proposals for disengagement. Moreover, if termination involves an element of negotiated settlement the President would seem to have an important role which in many cases may be adequately handled only by the President.

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[4] J. HARE, I AMERICAN CONSTITUTIONAL LAW 171-172 (1889).

[5] See *Legal Memorandum on the Constitutionality of the Amendment to End the War, reprinted* in *Congress, The President and The War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs of the House of Representatives*, 91ST CONG., 2D SESS. 513 (Comm. Print. 1970).

[6] 42 STAT. 105 (1921).

[7] 65 STAT. 451 (1951).

[8] 335 U.S. 160 (1948).

[9] *Id.* at 168. [Emphasis added.]

On balance Congress probably does and should have authority to enact legislation withdrawing prior authority to commit the Armed Forces to hostilities abroad [10] or withholding appropriations for the continuation of conflict. Any such legislation must be enacted by the same process as any other formal law, that is either with active or passive presidential sanction or over a presidential veto. Such legislation also must not place undue constraints on the President with respect to command decisions incident to the conduct of hostilities or with respect to the President's obligation to safeguard the Armed Forces during disengagement.

The importance of both the presidential and congressional roles in termination decisions suggest the critical need for initiatives from both branches aimed at promoting cooperation rather than conflict. The President should make every effort to candidly inform Congress of the goals, costs, and progress or lack of progress of the conduct of hostilities. Similarly, a congressional policy for termination of hostilities which conflicts with a presidential plan for disengagement should be adopted only with the greatest reluctance. Specifically, recent proposals to require total withdrawal of U.S. forces from Vietnam by a particular date would seem to greatly undercut the presidential negotiating role. Though such proposals may be constitutional in a formal sense, they should be adopted only if Congress has strong reason to doubt the wisdom of presidential policies.

Strengthening the Congressional Role in the Use of the Armed Forces Abroad

(By John Norton Moore*)

Mr. Chairman, it is a pleasure and a privilege to appear before the Senate Committee on Foreign Relations to discuss proposals for strengthening the congressional role in the use of the Armed Forces abroad. Throughout our history the proper allocation of authority between Congress and the Executive in the use of the Armed Forces has been surrounded by controversy. This controversy has been invited by a skeletal constitutional structure which gives Congress the power "to declare War" and to "raise and support Armies" but makes the President the "commander in chief" and the principal representative of the Nation in foreign affairs. That this controversy has persisted suggests that there is a great deal to be said for both the executive and the congressional roles. It also suggests that the issue is not simply the triumph of the views of either Pacificus or Helvidius but is instead the far more difficult quest for reasonable lines which will optimize the strengths of both Congress and the Executive.[1] The starting point in drawing such lines is to recognize that the war power controversy embraces more than one or two issues concerning initial commitment of the Armed Forces to military hostilities. Rather, it includes a wide range of issues encompassing a broad process of decision about national commitments, the deployment of forces abroad, the commitment of forces to combat, the conduct of hostilities and the termination of hostilities. To be most effective proposals for strengthening constitutional processes should be sensitive to this range of issues and their interrelation. Inadequate focus on the full range of issues may lead to an overgeneralized response which threatens the proper balance between congressional and presidential authority. The principal issues in this process are:

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[10] It is not at all clear that this was the intent or effect of the confused vote to repeal the Tonkin Gulf resolution. Both the passage and repeal of that resolution indicate a need for more precise expression of congressional intent.

*Professor of law and director of the graduate program, the University of Virginia School of Law, Charlottesville, Va.

[1] See generally on the constitutional issues and their historical background Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 Cornell L. Q. 1 (1961); Kurland, *The Impotence of Reticence*, 1968 Duke L. J. 619; Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 Naval War College Review 28 (1969); Moore, "Congress and the Use of the Armed Forces Abroad," in *Congress, The President, and the War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs of the House of Representatives*, 91st Cong., 2d Sess., (Comm. Print 1970) at 124; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243 (1969); Rogers, "World Policing and the Constitution" in 11 America Looks Ahead (World Peace Foundation 1945); Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, 16 Kansas L. Rev. 449 (1968); Francis D. Wormuth, *The Vietnam War: The President v. The Constitution* (an Occasional Paper of the Center for the Study of Democratic Institutions, 1968); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968); Symposium, *The Constitution and the Use of Military Force Abroad*, 10 Va. J. Int'l L. 32 (1969); *U.S. Commitments to Foreign Powers, Hearings Before the Committee on Foreign Relations of the United States Senate on Senate Resolution 151*, 90th Cong., 1st Sess. (Comm. Print 1967); *Congress, The President, and the War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs of the House of Representatives*, 91st Cong., 2d. Sess., (Comm. Print 1970). See also *Documents Relating to the War Power of Congress, The President's Authority as Commander-in-Chief and the War in Indochina, Senate Committee on Foreign Relations*, 91st. Cong., 2d. Sess. (Comm. Print 1970).

I. National commitments to use the Armed Forces abroad:
(a) What authority does the President have, acting on his own, to commit the Nation to a contingent future use of the Armed Forces?
(b) What authority does Congress have to limit Presidential authority to commit the Nation to a contingent future use of the Armed Forces?
(c) When, if at all, are national commitments for contingent future use of the Armed Forces self-executing without subsequent authorization?

II. The deployment of the Armed Forces abroad:
(a) What authority does the President have, acting on his own, to deploy the Armed Forces abroad?
(b) What authority does Congress have to limit Presidential authority to deploy the Armed Forces abroad?

III. The commitment of the Armed Forces to military hostilities:
(a) What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities?
(b) When congressional authorization is necessary, what form should it take?
(c) What authority does Congress have to limit Presidential authority to commit the Armed Forces to military hostilities?

IV. The conduct of hostilities:
(a) What authority does the President have, acting, on his own, to make command decisions incident to the conduct of a constitutionally authorized conflict?
(b) What authority does Congress have to limit command options incident to the conduct of a constitutionally authorized conflict?

V. The termination of hostilities:
(a) What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?
(b) What authority does Congress have to require termination of hostilities?
(c) When Congress terminates hostilities, what form should it take?

Although time precludes a systematic analysis of each of these issues,[2] it may be helpful to briefly review several issues which seem most relevant to the specific proposals before the committee. They are: What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities, and what authority does Congress have to limit Presidential authority to commit the Armed Forces to military hostilities?

I. The Authority of the President, Acting on His Own, To Commit the Armed Forces to Military Hostilities

The Constitution provides that "Congress shall have Power * * * to declare War * * *." It seems evident from Madison's notes of the debates in the Constitutional Convention that this provision was intended to lodge with Congress the power to commit the Nation to war. It seems equally evident that in changing the initial draft language empowering Congress "to make war" to language empowering Congress "to declare war" the Convention intended to leave "to the Executive the power to repel sudden attacks" and to make command deci-

[2] I have dealt briefly with the issues subsumed under headings III, IV and V in Moore, "Congress and the Use of the Armed Forces Abroad," *supra* note 1. On issues I and II see *Hearings Before the Committee on Foreign Relations of the United States Senate on Senate Resolution 151*, *supra* note 1; *Remarks of Senator Fulbright*, 97 CONG. REC. 520 (1951).

"One important issue has been quite clearly defined. That issue is whether the President should seek the advice of Congress on the question of sending troops to Europe now, or whether his discretion should be subject to the consent of Congress. Apparently the President is agreeable to the idea that it is proper for Congress to give him its advice about this question, leaving to him the full responsibility for making the final decision. He is willing, however, to accept the principle that the consent of the Congress is necessary to validate his decision. In other words, he does not agree that his decision in this matter must be subject to the approval of Congress.

"Personally, I agree with the position of the President. I do not agree with the proposal of the minority leader. The Congress has the right and power to raise the Armed Forces, but the President has the responsibility for the command of those forces. If in the exercise of his best judgment the defense of this country requires the sending of troops to Europe, he has the power and the duty to do so. Congress, of course, can refuse to appropriate the money for the troops but that is a decision for which Congress must take the responsibility. In the long run decisions on military strategy are best left to the Executive. That is the plain intent of our constitutional system. It would be dangerous for our future welfare to change the underlying principle simply because a strong minority or even a majority of the Congress may lack confidence in the wisdom of the Executive in some particular instance such as the present one."

Id. at 520-21. See also S. Res. 85 expressing the sense of the Senate relative to commitments to foreign powers.

sions incident to the conduct of hostilities.[3] Beyond these broad outlines the Constitution left broad gaps. Thus, it was uncertain which branch would have the authority to commit the Nation to force short of war or indeed what "war" meant.[4] Similarly, the scope of the Executive's power "to repel sudden attacks" was uncertain. Since no constitutional language is self-interpreting, particularly the broad brush strokes with which the framers set out the war powers, constitutional history, the practice of successive Congresses and Presidents, changed global conditions, and functional distinctions between Congress and the Executive are all revelant to defining constitutional policy.

During the 18th and 19th centuries, there were approximately 100 instances of use of U.S. armed forces abroad. Only three of these, the War of 1812, the Mexican War, and the Spanish-American War, were fully declared.[5] Congress, however, did participate in authorizing a number of other instances during this period such as the undeclared naval war with France. Moreover, most of these instances were relatively minor actions for the protection of nationals, for the suppression of pirates, or for the punishment of violations of international law. As American involvement in world affairs increased during the first half of the 20th century and particularly as it reached a high plateau of involvement following World War II, instances of use of the armed forces abroad have reflected a stronger Presidential role. From 1900 to 1970 there have been over 60 instances of the use of U.S. armed forces abroad of which only two, World War I and World War II, were fully declared by Congress.[6] Although many of the remainder of these incidents were either minor or authorized by Congress, a number evidenced a broad expansion of the Presidential role. Thus, major instances of Presidential commitment of the armed forces to military hostilities during this period include President McKinley's commitment of several thousand troops to the international army which rescued Western nationals during the Boxer Rebellion, President Wilson's arming of American merchantmen with instructions to fire on sight after Germany's resumption of unrestricted submarine warfare in 1917, President Franklin Roosevelt's Atlantic war against the Axis prior to the United States entry into World War II, President Truman's commitment of a quarter of a million American men to the Korean war, President Kennedy's commitment of substantial numbers of military advisory personnel to Vietnam, and President Johnson's commitment of marines to the Dominican Republic.

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[3] Madison's notes indicate that "Mr. Madison and Mr. Gerry moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks." They also indicate that Mr. Elseworth, who initially voted against this motion, changed his vote to one in favor of the motion after "the remark by Mr. King that '*make*' war might be understood to 'conduct' it which was an Executive function. * * *". NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 476 (Ohio University Press 1966).

[4] One authority on the concept of war in contemporary history and international law writes:

"The laws of the American Constitution which regulate the initiation of war obviously deal with war in the formal sense. The Constitution provides that only the Congress shall have the power to declare war. On the other hand there is little doubt that the President has been recognized the right, exercised frequently in the past, to utilize the armed forces for the defense of national rights and interests, which in many instances gave rise to a waging of war in the material sense. Hence the legal right and the practical power of the President of the United States to put into operation the country's armed forces outside of the United States has been a subject of considerable discussion. The question at stake was whether or not the Presidential use of armed force contradicted the terms of the Constitution according to which only Congress was entitled to initiate war.

"From the standpoint of modern international law the competence to initiate war under the American Constitution must be considered differently according to whether formal or material war is concerned. While the competence of the Congress to initiate war is concerned with war in the formal sense, the President, owing largely to his position as Commander-in-Chief, is entitled, if need be, to engage his military forces in material war."

L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 62 n. 73 (1956). See also Potter, *The Power of the President of the United States to Utilize Its Armed Forces Abroad*, 48 AM. J. INT'L L. 458 (1954); Note, *supra* note 1, at 1774–1775b, 1778–1794.

That the framers were aware of the distinction between declared war and measures short of war is suggested by the prevalence of hostilities without a formal declaration of war during the 18th Century. A study of hostilities in the absence of a declaration of war, compiled as long ago as 1883, indicates that historically the nations of the world had frequently utilized the power to engage in hostilities without a formal declaration of war. In fact, the author of the study found that:

"Circumstances have occurred in which "declarations of war" have been issued prior to hostilities: but during the 171 years here given (from 1700 to 1870 inclusive), less than ten instances of the kind have occurred. * * *

"On the other hand, 107 cases are recorded in which hostilities have been commenced by the subjects of European Powers or of the United States of America against other powers without declaration of war." MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR 4 (1883). This study was concerned with cases in which hostilities were commenced prior to formal declaration of war, and the number of cases in this study in which there was never a declaration of war would be substantially lower.

[5] See the list of instances of use of United States Armed Forces abroad from 1798–1970 in *Background Information on The Use of United States Armed Forces in Foreign Countries, Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs*, 91ST CONG., 2D SESS. (Comm. Print Rev. 1970), at 50, Appendix II.

[6] *Id.* at 54–57.

In view of the decision of the Constitutional Convention to lodge with Congress the power to commit the Nation to major hostilities abroad, the expanded Presidential role may have gone too far. In particular, the waging of a sustained major war in the Korean conflict without explicit congressional authorization, a war in which the United States sustained more than 140,000 casualties, seems a poor precedent.[7] On the other hand, experience suggests a need for some independent Presidential authority in committing troops to combat abroad. There may be a need for defense against sudden attacks on American forces abroad, sudden attacks on areas which the Nation is committed by treaty to defend, minor commitments such as humanitarian intervention, the protection of nationals or regional peacekeeping operations, defensive actions such as the Cuban missile crisis requiring secrecy and negotiating responsiveness, and ongoing command decisions concerning day-to-day operations of military assistance programs or defense deployment of American forces. These may all be areas in which the need for decisiveness, speed, secrecy, negotiating responsiveness or simply the difficulty in informing Congress on a day-to-day basis call for some room for Presidential authority. These functional needs should neither be exaggerated nor underestimated. With the exception of the Korean war the need for speed has probably been exaggerated. On the other hand, more subtle linkages to Presidential bargaining power in contexts of threat and negotiation may have been generally underestimated.

It is clear that American constitutional history supports a substantial role for the President in the initial commitment of the Armed Forces to combat abroad in defending against attacks on U.S. forces or territory and in situations short of war or sustained major hostilities. The real issue in allocating authority between Congress and the President in initial commitment decisions is not whether the President has a role but rather what the limits are on that role and how it might be adequately policed. In this respect several kinds of tests have been suggested. One would look to the purpose of the Presidential use of force. Along these lines a thoughtful recent note in the *Harvard Law Review* suggests that we might allow Presidential initiatives which are " 'neutral' with respect to foreign political entities."[8] Other purposes commonly suggested as a basis for independent Presidential authority are protecting American nationals abroad and repelling attacks on U.S. territory or Armed Forces. A second kind of test would look to the actual or probable magnitude of hostilities. For example, I have suggested that congressional authorization should be required in all cases where regular combat units are committed to hostilities which are likely to become or do become sustained hostilities.[9] This test is a rough effort to separate major hostilities from those not involving substantial casualties and commitment of resources. Prof. Quincy Wright rephrases this test as "the President should obtain congressional support in advance for military action which will probably require congressional action, as by appropriations, before it is completed."[10] None of the tests suggested to date are wholly satisfactory and all are frayed at the edges. Nevertheless, my own feeling is that some version of the test based on probable or actual magnitude of hostilities is preferable to a purpose of the use test. A magnitude test seems more functionally responsive to the major policy decision of the Constitutional Convention to require congressional authorization before the Nation can be committed to major hostilities abroad. Moreover, constitutional history demonstrates too many diverse purposes for presidential commitment to minor hostilities to make a purposes test workable.

The judgment that Congress should oversee the Nation's involvement in major hostilities abroad remains as valid today as it was in 1789. Congressional support of that policy, however, should not destroy needed presidential flexibility.

II. The Authority of Congress To Limit Presidential Authority To Commit the Armed Forces to Military Hostilities

At a minimum, independent Presidential authority to commit the Armed Forces to hostilities includes authority to repel sudden attacks on the United States or its Armed Forces. Both constitutional experience and policy suggest that Presidential authority also extends to a range of activities short of war and to responses

[7] Senator Douglas, however, presented a paper to Congress on the constitutional basis for the President's action in using armed forces to repel the attacks against South Korea in which he concluded that despite the absence of congressional authorization the President's action was "in thorough harmony with the legislative intent of the framers of the Constitution" and "in line with sound historical precedent." Douglas, *The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea*, 96 CONG. REC. 9647, 9649 (1950).

[8] Note, *supra* note 1, at 1794–1798.

[9] See Moore, *The National Executive and the Use of the Armed Forces Abroad*, *supra* note 1, at 32.

[10] See Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT'L L. 43, 49 (1969).

to situations of genuine emergency in which prior congressional authorization is not feasible. It is doubtful how far this independent authority may be constitutionally restricted by Congress. On the one hand, a number of factors point to broad congressional authority to limit independent Presidential authority.[11] Thus, under the Articles of Confederation the Continental Congress seemed to take a broad view of its own authority and a narrow view of the authority of George Washington as Commander in Chief. Similarly, *The Federalist Papers* suggest that the framers were concerned to distinguish the war powers of the President from the broad inherent powers of the British monarch. Moreover, Congress has authority not only "to declare war" but "raise and support Armies [and a Navy]," "to make rules for the Government and regulation of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. * * *"[12] Several Supreme Court decisions also lend some support to this position. In a line of cases growing out of the undeclared naval war with France the Supreme Court seemed to subordinate Presidential directives on capture of ships to detailed congressional regulations authorizing the modalities of capture.[13] And in the famous "Steel Seizure" case the Court held that President Truman could not validly direct the Secretary of Commerce to take possession of the steel mills to avert a strike during the Korean war in the face of congressional legislation precluding such action.[14] In a concurring opinion Mr. Justice Jackson pointed out that Presidential authority is highest when the President acts with congressional authorization and is at its lowest ebb when the President acts in opposition to Congress.[15]

On the other hand, there are a number of at least equally strong reasons for suggesting that congressional restrictions on the independent authority of the President would be unconstitutional. First, the general historical argument for broad congressional authority proves too much both in terms of history and in terms of principles of constitutional interpretation. The historical evidence is fragmentary at best that there was any thought given to the specific issue of congressional authority to limit independent Presidential authority. Yet it was clear that the Constitutional Convention at least intended the President to have the independent authority to repel sudden attacks and to conduct the course of hostilities. Furthermore, reliance on the experience under the Articles of Confederation seems a frail reed for interpreting a Constitution promulgated in large measure as a result of dissatisfaction with the experience under the Articles. Perhaps more to the point, historical evidence as to the intent of the framers, however realistic an approximation, is only one source for interpreting a living document such as the Constitution. As Mr. Justice Frankfurter pointed out in a concurring opinion in the *Steel Seizure* case: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[16] Nowhere is this statement or that of Mr. Justice Holmes that "the life of the law has not been logic: it has been experience"[17] been more apt than in the interpretation of the war power. In the more than 180 years following the adoption of the Constitution there have been numerous instances of Executive action committing the Armed Forces to hostilities abroad yet there are few instances in which Congress has sought to place restraints on Executive action. One such restraint was enacted by Congress as a proviso to the Selective Training and Service Act of 1940. It provided:

"Persons inducted into the land forces of the United States under this act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands."[18]

The proviso, however, was partial in that it did not apply to volunteer personnel or naval forces and was in any event repealed almost at once following the outbreak of World War II. A more recent example is the proviso in the Defense Appropriation Act of 1969, which provides that none of the funds appropriated

[11] See generally *A Brief on S. 731, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War*, CONG. REC. S. 2527 (daily ed. March 5, 1971).
[12] U.S. Const., Art. I § 8.
[13] See Bas v. Tingy, (The Eliza) 4 U.S. (4 Dall.) 36 (1800); Talbot v. Seeman (The Ship Amelia), 5 U.S. (1 Cr.) 1 (1801); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cr.) 169 (1804).
[14] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).
[15] *Id.* at 634, 637.
[16] *Id.* at 593, 610.
[17] See I MARK DEW. HOWE, JUSTICE OLIVER WENDELL HOLMES, 26 (1957).
[18] Act of September 16, 1940 (54 Stat. 885, 886).

by the act "shall be used to finance the introduction of American ground combat troops into Laos or Thailand." [19] In comparison with the active history of Presidential initiatives in the use of the Armed Forces abroad the lack of congressional restraints suggests a cautious estimate of congressional authority to limit independent Presidential authority. Perhaps because of this lack of historical precedent for broad congressional authority, at least two American Presidents have urged that such restrictions might be unconstitutional. President Taft said:

"The President is made Commander in Chief of the Army and Navy by the Constitution, evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection, and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the Army for any of these purposes, the action would be void." [20]

And President Fillmore said that:

* * * no legislation could add to or diminish the power * * * [of the President to use the regular Armed Forces] but by increasing or diminishing or abolishing altogether the Army and Navy." [21]

With respect to the principle of the *Steel Seizure* case that the President's authority is at its lowest ebb when he acts in opposition to congressional action, it does not follow that in all such situations the congressional action will prevail. In this respect the *Steel Seizure* case is hardly on point when the issue is the authority of the President to use the Armed Forces abroad, since the case involved a domestic aspect of the Presidential war power and at that a domestic aspect which was far from clear even in the absence of limiting congressional legislation. In many ways a case which is more on point is *Myers* v. *United States* [22] in which the Supreme Court struck down an act of Congress which sought to require the concurrence of the Senate in Presidential decisions to dismiss certain postmasters. The Court held that the President's removal power over executive agencies was an exclusive power even though the Constitution provides for the concurrence of the Senate on the initial appointment and even though the experience under the Articles of Confederation had been to allow congressional exercise of the removal power. Another Supreme Court case suggesting limitations on congressional authority to limit the independent authority of the President is *Ex Parte Milligan*.[23] In that case Chief Justice Chase pointed out that congressional authority did not extend to interference with Presidential command decisions. According to the Chief Justice, congressional authority "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief." [24]

Although this statement in *Ex Parte Milligan* deals specifically with the core area of command decisions in the conduct of hostilities which is one of the strongest areas for exclusive presidential authority, the principle that there are some areas of exclusive presidential power in the use of the Armed Forces abroad is clear. In fact, this principle enumerated in *Ex Parte Milligan* seems more applicable than the line of cases growing out of the undeclared naval war with France which are suggested to be indicative of broad congressional authority.[25] Although *Little* v. *Barreme*,[26] the principle case in this series, applied a congressional act limiting lawful naval captures during the war rather than a presidential interpretation of that act, the issue in the case was a narrow one of civil liability for damages for capture and detention rather than the validity of a broad restriction on independent presidential authority. Moreover, these cases involved an issue

[19] 83 Stat. 469 (1969).

[20] Q. Wright, The Control of American Foreign Relations 308 (1922).

[21] Wright, *supra* note 10, at 46. The statement in Professor Wright's context is:

"The Supreme Court has held that it belongs to the President himself to determine the exigencies in which a call for the militia under the congressional act of 1792 is justifiable, and the same principle would seem to apply to uses of the regular forces if, as was assumed in the Constitutional Convention, as Commander-in-Chief he uses them for necessary defense of the territory and probably other purposes such as protection of citizens abroad. President Fillmore, like all other presidents except Buchanan, insisted that the Constitution itself granted the President power to utilize the regular armed forces, even though power to call forth the militia depended upon congressional delegation. "Probably," he added, "no legislation could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the army and navy." The Supreme Court, as well as long practice, has sustained this position in the *Neagle*, *Debs* and other cases."

Id.

[22] 272 U.S. 52 (1926). This case is also cited by Mr. Justice Jackson in his concurring opinion in the "Steel Seizure" case as an example of a case in which presidential actions incompatible with the expressed will of Congress were nevertheless upheld. Youngstown *Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 at 638 n. 4.

[23] 71 U.S. (4 Wall.) 2 (1866).

[24] *Id.* at 139. (Opinion of the Chief Justice and Justices Wayne, Swayne, and Miller.)

[25] See *A Brief on S. 731*, *supra* note 11, at S. 2529.

[26] (The Flying Fish), 6 U.S. (2 Cr.) 169 (1804).

squarely within a specific grant of authority to Congress. That is, the power "to make Rules concerning Captures on Land and Water." [27] Under the circumstances it hardly seems surprising or relevant that a congressional act concerning rules for captures was preferred by the Court to a presidential interpretation of that act.

If the arguments for and against a broad congressional authority to limit the independent presidential authority to commit the Armed Forces to hostilities abroad are inconclusive, at least one astute constitutional observer, Prof. Quincy Wright has unambiguously urged that:

"[I]f he considers such action essential for the enforcement of acts of Congress and treaties and for the protection of the citizens and territory of the United States, the President is obliged by the Constitution itself to use his power as commander in chief to direct the forces abroad, *and this duty resting on the Constitution itself cannot be taken away by act of Congress.*" [28]

On balance, Congress would seem to have the authority to limit Presidental use of the Armed Forces abroad in areas which fall within exclusive congressional authority. Using my earlier test, I believe that Congress would have the authority to prohibit, or place restrictions on Presidential commitment of regular combat units to sustained hostilities abroad. In areas which do not fall within exclusive congressional authority, however, it is unclear whether Congress could limit Presidential authority. The same policies which suggest some independent Presidential authority also suggest that except in extreme cases of Presidential abuse Congress should not be able to limit such authority.

III. An Analysis of Current Proposals for Strengthening the Congressional Role in the Use of the Armed Forces Abroad

The proposals for strengthening the congressional role in the use of the Armed Forces abroad which are before the committee, S. 731, introduced by Senator Javits, Senate Joint Resolution 59, introduced by Senator Eagleton, and Senate Joint Resolution 18, introduced by Senator Taft, differ in specifics but are similar in that they all delimit in advance the independent authority of the President to

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[27] U.S. Const., Art. I, § 8.

[28] Q. Wright, *supra* note 20, at 307 (emphasis added). On the same page Wright reiterates that:

"By reduction of the army and navy or refusal of supplies, Congress might seriously impair the *de facto* power of the President to perform these duties, but it can not limit his legal power as Commander-in-Chief to employ the means at his disposal for these purposes."

Id. at 307 n.93. Elsewhere Wright makes the same point equally forcefully:

"[A]uthority supported by practice shows that the President has independent power under the Constitution to employ the military or naval forces of the United States at home or abroad except as restricted by international law, in time of peace to enforce the laws and treaties, to protect officers of the United States, to prevent obstruction of national functions, to protect the privileges and immunities of American citizens, to prevent foreign aggression and to protect inchoate interests of the United States abroad; and in time of war to prosecute campaigns, to compel submission of the enemy and to govern occupied territory. It is true that Congress can authorize the use of the armed forces either by Declaration of War or by Joint Resolution In time of peace and the President is bound to execute such declaration or resolution, *but Congress can not impair the concurrent power of the President to authorize the use of forces as given by the constitution.*"

Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COL. L. REV. 121, 135-36 (1920) (emphasis added). And in speaking of a proposed reservation to the Peace Treaty which would have provided that "Congress * * * under the constitution has the sole power to declare war or authorize the employment of the military or naval forces of the United States," Wright says: [t]he first part is merely declaratory, the second unconstitutional." *Id.* at 134.

Writing in 1929 Professor Westel Willoughby of The Johns Hopkins University said:

"There has been no question as to the constitutional power of the President of the United States, in time of war, to send troops outside of the United States when the military exigencies of the war so require. This he can do as Commander-in-Chief of the Army and Navy, and his discretion in this respect can probably not be controlled or limited by Congress."

III W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, 1567 (2d ed. 1929). Professor Willoughby goes on to say:

"As to his constitutional power to send United States forces outside the country in time of peace when this is deemed by him necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States, there would seem to be equally little doubt, although it has been contended by some that the exercise of this discretion can be limited by congressional statute. That Congress has this right to limit or to forbid the sending of United States forces outside of the country in time of peace has been asserted by so eminent an authority as Ex-Secretary Root. It would seem to the author, however, that the President, under his powers as Commander-in-Chief of the Army and Navy, and his general control of the foreign relations of the United States, has this discretionary right constitutionally vested in him, and, therefore, not subject to congressional control. Especially, since the argument of the court in Myers v. United States with reference to the general character of the executive power vested in the President, and, apparently, the authority impliedly vested in him by reason of his obligation to take care that the laws be faithfully executed, it is reasonable to predict that, should the question be presented to it, the Supreme Court will so hold. Of course, if this sending is in pursuance of express provisions of a treaty, or for the execution of treaty provisions, the sending could not reasonably be subject to constitutional objection."

Id. Cf. Fulbright, *supra* note 1.

"The source of an effective foreign policy under our system is Presidential power. This proposition, valid in our own time, is certain to become more, rather than less, compelling in the decades ahead. * * *

"As Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes."

Id. at 2, 3.

commit the Armed Forces to hositilities. The purpose of these initiatives is commendable in seeking to clarify the constitutional balance on a vital issue. But to the extent that they restrict Presidential authority beyond the area of exclusive congressional competence they are of doubtful constitutionality. To use S. 731 as an example, it limits independent Presidential authority to four categories. Even in those four categories Presidential authority is only recognized as initial and "shall not be sustained beyond 30 days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond 30 days." [29] But the independent authority of the President is probably substantially broader than the four categories in the bill. Thus, Presidential authority would also seem to include certain low-level commitments such as regional peacekeeping, actions in defense of U.S. interests in free transit of international straits, humanitarian interventions such as the Stanleyville operation, defensive quarantines such as were involved in the Cuban missile crisis, and the commitment of military assistance advisory groups provided that such commitments stop short of the commitment of regular combat units to sustained hostilities. Though some of these situations might be brought within the language of the bill, most seem prohibited or at least doubtful in the absence of a prior declaration of war. In attempting to restrict the area of independent Presidential authority, then, this bill may be unconstitutional. Even if the bill is constitutional, it seems unwise to enact such a constitutionally uncertain restriction. In the absence of greater constitutional clarity the bill might precipitate a constitutional crisis between Congress and the President when the Nation can least afford it. Since the area is one regulated in general terms by the Constitution, it may be unwise to attempt a specific codification by statute.

Regardless of the resolution of the constitutional issues, a fundamental objection to proposals which seek to delimit independent Presidential authority is the difficulty and consequent danger in attempting to specify in advance a policy-responsive division of authority. As an illustration of this difficulty it may be useful to examine several initiatives historically within Executive competence which would be prohibited by these proposals in the absence of prior congressional authorization. By way of illustration I will refer to the specifics of the carefully drafted S. 731, but each of the parallel proposals could be similarly analyzed. In the absence of a prior declaration of war S. 731 would prohibit, among others, the following kinds of Presidential initiatives: Humanitarian intervention similar to the joint United States-Belgian operation in the Congo if the intervention were not for the protection of U.S. nationals,[30] an attack on U.S. naval vessels in transit in international straits or engaged in innocent passage in the territorial sea, a threat of imminent attack against the United States or U.S. forces similar to that facing Israel prior to the 6-day war, collective defense against a sudden armed attack on a nation to which we have no "national commitment" (under this standard President Truman would have required a prior declaration of war before engaging North Korean forces in the Korean war as it was not until 1954 that the mutual defense treaty with Korea entered into force. Since we have no specific defense treaty with Israel, or for that matter with Egypt, a parallel problem is not impossible under present conditions in the Middle East), low level or intermittent counterintervention, as for example a hypothetical airstrike made at the request of the Jordanian Government against Syrian tank columns intervening in the recent civil war, military hostilities arising from efforts to prevent foreign warships from engaging in espionage activities within U.S. territorial waters, the naval quarantine of Cuba against the emplacement of Soviet IRBM's if "military hostilities" were necessary to maintain the quarantine (in this case apparently the only lawful route for the Cuban quarantine of 1962 which the President could rely on would have been a prior declaration of war against the Soviet Union or Cuba! In addition to these areas which seem fairly clearly to require a prior declaration of war under the bill, a large number of other important areas are ambiguous. For example, as written the Bill might require a prior declaration of war in order for the United States to participate in a United Nations or OAS peacekeeping operation, to participate in a Big Four peacekeeping operation in the Middle East, to proceed in hot pursuit of attacking forces, and to provide military assistance advisory teams in insurgency settings. My own feeling is that it would be unwise in the extreme to deprive the President of needed flexibility in the many situations such as these which are clearly or ambiguously prohibited by the bill. Even if it is possible to seek prior congressional action in some of these cases, the bill does

[29] Sec. 1(c) of the bill.

[30] As to the permissibility of humanitarian intervention under international law see generally Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Moore, *The Control o Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 261-264 (1969).

not make adequate provision for fast action in situations in which Congress is not in session (for example during an election year). Moreover, in requiring a formal declaration of war as the only means of authorization for categories other than the four listed, the bill rejects the constitutional practice which properly treats any specific form of congressional authorization as sufficient, a practice which was specifically adopted by the committee during the "National Commitments" hearings.[31] The bill also seems inconsistent with the United Nations Participation Act of 1945 which provides that "[t]he President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said charter and pursuant to such special agreement or agreements [an art. 43 agreement] the Armed Forces, facilities, or assistances provided for therein. * * *"[32] Though no article 43 agreement has yet been concluded, the recent Brewster report of the United Nations Association recommends a renewed effort to negotiate such an agreement.[33] In light of the critical need to strengthen the capability of the United Nations it seems unwise to discard the United Nations Participation Act even if it has not yet been implemented.

S. 731 may also be overly restrictive with respect to the operation of the 30-day limitation and the applicability of the procedures for expedited consideration. Inexplicably, the commendable procedure for expedited consideration is only available with respect to continuation of hostilities within the four categories of initial Presidential authority. Other situations would not even benefit from these expedited procedures, yet the President would be prohibited from acting even on an emergency basis until he first secured a congressional declaration of war. Even in the areas in which the expedited procedure is applicable, Congress may still be unable to affirmatively act within 30 days, possibly because of disagreement about the modalities of action or restrictions on the action rather than because of any disagreement about whether the action should be taken. The bill would also remove any flexibility now possessed by Congress in exercising discretion about the advisability of a full congressional debate at the time of the action.

These examples suggest the difficulty if not impossibility of satisfactorily delimiting Executive authority in advance (and particularly of satisfactorily delimiting it in advance by a purpose of the action test). Efforts to delimit in advance despite these difficulties are likely to lead to a rigidity which would destroy presidential independence needed for the management of crisis situations. Perhaps for these reasons the witnesses testifying before the House Subcommittee on National Security Affairs last summer on similar proposals then pending before the House, largely agreed on the danger of approaches which sought to delimit Presidential authority in advance even though they disagreed on the constitutional implications of such measures.[34]

Finally, though the congressional interest in improving constitutional processes in the use of the Armed Forces abroad should be encouraged, efforts aimed principally at restricting Presidential authority in advance may prove too much. Congress already has consitutional authority to terminate major hostilities, at least where such hostilities require initial congressional approval.[35] As such, any gain from restricting Presidential authority or from an automatic 30-day authorization deadline hardly seems worth the price. Conversely, as a result of his power as the principal representative of the Nation in foreign affairs, the President may frequently be in a position to precipitate or avoid war by the diplomatic posture

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[31] See the *Report of the Senate Committee on Foreign Relations*, 90TH CONG., 1ST SESS., *National Commitments* 25 (No. 797, Nov. 20, 1967). "The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities." *Id.* Constitutional scholars are in substantial agreement with this principle. See, *e.g.*, Reveley, *supra* note 1 at 1289.

[32] 59 Stat. 619–621 (1945).

[33] See "Controlling Conflict in the 1970's," *The Report of the United Nations Association of the United States Policy Panel on Multilateral Alternatives to Unilateral Intervention* 41 (1969) (The Panel was chaired by Kingman Brewster, Jr.).

[34] See, *e.g.*, *Congress, The President, and the War Powers*, *supra* note 1, at 23–25 (McGeorge Bundy), 36, 38, 49, and 77 (W. T. Mallison, Jr.), 45, 50, 56–58, 79 (Alexander M. Bickel), 58, 74, and 75 (William D. Rogers), 89 (James MacGregor Burns), 130 (John Norton Moore), 135–37 (Abram Chayes) 210 (John R. Stevenson), 216 (William H. Rehnquist), 304 (Nicholas de B. Katzenbach). On the constitutional issues Professor Mallison expressed doubts about the constitutionality of such proposals and Professor Bickel supported the constitutionality of such proposals. See *id.* at 38, 49, and 77 (Professor Mallison) and at 50 (Professor Bickel).

[35] It is worth noting that the Articles of Confederation assigned the Congress the power to determine "on peace" as well as on war. Yet at the Constitutional Convention a motion by Mr. Butler "to give the legislature [the] power of peace, as they were to have that of war," failed of adoption. The remarks of Mr. Gerry who seconded the motion suggest that the delegates expected that the Senate rather than the Congress would make decisions "on peace," probably through the treaty power which was the usual technique for concluding formally declared wars. See NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON, 477 (Ohio University Press, 1966).

which he selects. Prior to the Japanese attack on Pearl Harbor, it was the President who played the predominant role in war-peace decisions. After the attack, the congressional declaration of war was little more than a formality. And in the European theater, President Roosevelt's decision to convoy allied shipping made it more likely that American Armed Forces would be attacked. Similarly, President Truman's decision to deploy seven divisions in Germany or the recent effort prior to the six-day war to join with other maritime nations to send shipping through the Strait of Tiran, might have precipitated an escalating series of events making congressional action inevitable. The issues in the use of the Armed Forces abroad involve a process of decision rather than a single commitment decision. Control of this process requires congressional involvement in decisions both prior and subsequent to initial commitment of the Armed Forces to combat. A vigorous congressional involvement in each of these areas would probably be more effective than reliance on mechanical tests for delimiting Presidential authority.

IV. Recommendations for Strengthening the Congressional Role in the use of the Armed Forces Abroad

Strengthening the congressional role in the use of the Armed Forces abroad is largely a problem in achieving balance throughout a range of decisions from the decision to make a national commitment to the decision to terminate hostilities. Decisions on any one issue may be predominatly executive or predominantly congressional, but the overall effect must be to reinforce the functional strengths of each branch and the essential partnership between both branches. The starting point in this process is the decision to make a national commitment. Congress should play a major role in considering national commitments which may subsequently lead the Nation into major hostilities. The setting of national priorities and goals is certainly a paradigm function of the more broadly based Congress.

With respect to decisions to commit the Armed Forces to military hostilities, the President should seek meaningful congressional authorization prior to the commitment of the Armed Forces to sustained military hostilities. In conflicts like the Korean war, in which there may be a genuine need for speed, the President would be required to submit his action to congressional scrutiny at the earliest opportunity. And in conflicts which gradually escalate, the dividing line for requiring congressional authorization might be the initial commitment to combat of regular U.S. combat units as such. The President also should seek congressional involvement whenever feasible in other circumstances and should not rely on exaggerated claims of speed or secrecy. In any sustained hostilities the President is dependent on congressional cooperation, and to fail to obtain congressional involvement when such involvement is feasible is to needlessly weaken the Presidential action as well as to weaken the constitutional structure. For its part, when considering initial commitment decisions, Congress should consider carefully the scope of its authorization and the probable implications of its action. In retrospect, although the Tonkin Gulf resolution was a valid congressional authorization for increased U.S. involvement in the Indochina war, the unnecessary sense of urgency surrounding its passage and the ambiguity of the congressional debates suggest that both Congress and the President share responsibility for a sloppy exercise of congressional authority.[36] In this respect the standards developed for such authorization during the course of the national commitments hearings are a useful starting point.[37]

It seems probable that in a post-Vietnam world, Congress will be particularly sensitive to the need for care in authorizing sustained hostilities. Even so it might be helpful in confirming the congressional role in the commitment of the Armed Forces to military hostilities if Congress would require a report from the President whenever there is a substantial shift in the deployment of troops abroad or a commitment of the Armed Forces to military hostilities. The reporting idea in the proposals before the committee and in House Joint Resolution 1, which is the parallel legislation in the House, is sound and might be adopted by Congress as a useful step. Such a requirement also has the advantage of avoiding the constitutional and practical dangers in efforts to delimit Presidential authority in advance while operating to trigger congressional action where needed and to hasten an

[36] For a discussion of the legal effect of the Tonkin Gulf Resolution see Moore, *The National Executive and the Use of the Armed Forces Abroad*, *supra* note 1, at 36-37 & 38 n. 16. And with respect to the constitutional issues in the Cambodian incursion see Moore, *Legal Dimensions of the Decision To Intercede in Cambodia*, 65 AM. J. INT'L L. 38, 61-72 (1971).

[37] See Report, *National Commitments*, *supra* note 31, at 26.

orderly common law growth in the division of authority between Congress and the President. It might also be useful in encouraging greater Executive cooperation with Congress if Congress were to adopt expedited procedures for the authorization of certain kinds of non-major hostilities. Senator Douglas suggested such procedures at the time of the constitutional debate during the Korean war and if such procedures were carefully safeguarded to assure meaningful congressional authorization they might encourage greater cooperation between Congress and the Executive.[38] Finally, in the exercise of its concurrent authority to terminate major hostilities, Congress should play a continuing role in reexamining major policy. To facilitate this role it might be helpful to create a mechanism for continuing cooperation between Congress and the President during the course of major hostilities. For example, it might be useful to encourage periodic meetings between the President and congressional leaders during the continuance of sustained hostilities. Similarly, it might be useful for Congress to create new machinery to facilitate such continuing communication with the Executive. One possibility would be a joint congressional body composed of appropriate representatives from the Foreign Affairs, Appropriations, and Armed Services Committees of both Houses. Whatever the mechanism, there is a major need to improve the communication between Congress and the Executive concerning the exercise of the war powers. I would also urge the importance of congressional oversight continuing to proceed on a nonpartisan basis.

In considering proposals for strengthening the congressional role in the use of the Armed Forces abroad Congress should not let the present dissatisfaction with the Indo-China war lead to a proposal which may alter the proper balance between Congress and the Executive. The Indo-China war will come to an end, but the need for balance between the Executive and Congress will continue. In August 1937 the Young Democrats of America voted unanimously at their national convention to endorse the Ludlow amendment requiring a national referendum before declaration of a foreign war.[39] Five years later as the Nation fought World War II the proposal seemed strangely dated. History teaches that we tend to respond to past problems rather than anticipate future dangers. In the long run a commitment to a balance between congressional and Presidential authority seems the best safeguard to avoid this trap.

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[38] See Douglas, *supra* note 7, at 4649.

"I submit, moreover, that we of the Congress could make it easier for the President to consult us in the event of such a national emergency, and to share any attendant responsibility, by so revising our rules that congressional action in such matters can be speeded up. The House, for example, might waive for this range of subjects the formal engrossing of a bill and the Senate could for such issues permit the vote on cloture to come more quickly after the submission of the petition."

Id.

[39] See 84 CONG. REC. 2055 (1939).

Statement by Charles A. Weil, of New York, N.Y.

Thanks for your kind invitation to supplement my testimony of last July 9 opposing presidential war power legislation, that would fetter the Executive, the only branch qualified and staffed to implement a strategy of power balance requiring forward deployment and, if necessary, prevenient war.

This invitation is particularly appreciated evidencing Mr. Zablocki's objectivity though sponsor of House Joint Resolution 1, the least exceptionable of the pending bills. For House Joint Resolution 1 calls for the leveling with the people and Congress my testimony recommended ad hoc; under the special circumstances of the Indo-China war, if the suppressed justification I sought to lay before the Fulbright and Symington committees was the undisputed beachhead doctrine, particularly since the Sino-Soviets were aware of it. (Prior testimony, point III at pp. 250, 251–254, pp. 258, 262–263.) However, such special circumstances may not always obtain, as for example, those testified to by Ambassador Sullivan, page 399, before the Subcommittee on U.S. Security Agreements Abroad of the Committee on Foreign Relations, U.S. Senate part 2, relative Laos.

There is one point only to add to the objections I was privileged to raise to the then pending war powers bills (hearings, pp. 248–251 and 256 of the printed record) submitted hereunder:

That is the capability; under present rules of procedure, not expressly provided for in the Constitution; of concealment by a Foreign Relations Committee chairman; a position likewise not expressly provided for in the Constitution; from other members of his committee, the two Houses of Congress, and the public; of the real political and military objectives of combat, as in Indochina, where in the informed discretion of the President, for reasons of State, such reasons and objectives could not be enunciated by the last five Presidents.

To leave such absolute discretion in the hands of one mortal; perhaps unqualified, subject to human infirmities, and/or not necessarily privy to top secret intelligence and professional advice available to the executive branch; is something never contemplated by the framers of the Constitution, who also could not have foreseen the United States becoming the global arbiter or power balancer. What is worse, it involves a gamble on the security of 200 million Americans and of the billions in other countries dependent on the power of this country; that no man in his senses could contemplate today.

FIAT FULBRIGHTS PEREAT U.S.A.?

Since 1967 I have been in protracted correspondence with Senator Fulbright seeking to lay before his committee one such geostrategic objective or explanation fully disclosed, without avail to him. I have read thousands of pages of Senate Foreign Relations Committee hearings, that have received wide coverage in the media and from which hearings it appears Senator Fulbright has asked only witnesses he knew, or should have known, did not know the answer, or were not authorized to answer frankly, fully, his queries relative the only relevant, material questions; as to the overall objectives and national security geostrategic justification for fighting in Indochina (e.g. CORDS hearings pp. 15–16).

Finally, in November, 1969, Mr. Fulbright wrote me to submit a memorandum on the subject for his committee, which I did at once. He discreetly ignored the plea therein to be cross-examined on it. There is no evidence any other member of the committee or Senate saw it until it went to the printing office many months later. I charged Senator Fulbright with concealment and on May 26, 1971, offered to apologize if one member of the committee would write he had seen it prior to closure of the hearings. At date of writing no such communication has been received. (Cf. CORDS hearings p. 746.)

For that memorandum gave an answer, he has, I believe, never really wanted answered, to use his own words, "to help inform the American public opinion" (CORDS hearings, p. 1). All of which is entirely apart from his own qualifications to be the discretionary security guardian of 200 million Americans in light of his allegation geopolitics is "hocus pocus" (speech to the Senate August 24, 1970).

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Seven of the 15 members of the Senate Foreign Relations Committee were elected from States which cast only 2,311,000 votes compared to the 73,198,000 who voted in the Presidential election. Borah was elected from Idaho (291,183 total votes in 1968). Nor is the possible perversion of congressional hearings into *ex parte* proceedings or kangaroo courts the only, though principal, objection to the pending legislation.

The Vice President set them forth; that is: the distortion and private censorship of crucial facts and considerations by the academic-media-complex; including what he overlooked, the pollsters and book publishers, mentioned in my prior testimony, point II (pp. 249–51 and p. 258) of the printed hearings and more fully covered in my book, "Curtains Over Vietnam" (pp. 11–17 on the "Copperhead Curtain" and pp. 65–70 on "The Educational Gap").

The conjecture of such misconduct in committee and a subverted media make the proposed limitations on the President's powers at best a piece of personal power greediness, at worst a recipe for suicide of a Nation whose security, prosperity and standard of living rest on being the global power balancer.

Statement by Prof. Theodore J. Lowi, Department of Political Science, University of Chicago

The following statement is drawn from my book "The Politics of Disorder" (Basic Books, June 1971). It is an elaboration of remarks made to this committee in July, 1970, and, as before, it refuses to address itself directly to the various resolutions under consideration by Congress regarding a statutory ending of the Vietnam war.

I consider these resolutions a dangerous precedent, but not because of their specific provisions or because of their assertion of congressional power in international affairs. They are bad precedents because they arise out of a specific crisis and are too closely designed for those particular problems. They represent no long range solution, even if they hastened the end of the present war.

My concern in this statement is, therefore, for the next war. It is concerned with making adjustments in the separation of powers consonant with the third quarter and the fourth quarter of this century. It is concerned with making an adjustment to the discovery that "World Leadership" is an empty phrase.

On the positive side, my concern is for how to make democracy safe for the world, how to make democracy a rational and restraining force in world affairs rather than the goading and volatile force it has so often been. This necessarily means putting Congress into the center of the action. But how? This is what I try to demonstrate in the following essay, a statement for Congress, but one that is calculated to praise, not to please.

President and Congress: War and Civil Liberties

(By Theodore Lowi)

[An excerpt from "The Politics of Disorder" (New York; Basic books, 1971). pp. 80-101]

The credibility gap is a new name for an old affliction. It is an affliction of the process of communication between a people and its Government. And it is an affliction to which foreign policy in a democracy is particularly susceptible. During the Vietnam war the affliction has achieved epidemic proportions. For many thousands of Americans, opposition to the war is based more on what was said than on what was done.

There may be no way for mass democracies to avoid this sort of affliction. Secret diplomacy is extremely unstable and problematic, and there is still yearning for "open agreements openly arrived at." Machievelli to the contrary notwithstanding, lying is the greatest risk of all. Appearances may be deceiving at first; but in a free country the lies of the past have a way of being round out and creating the credibility gaps of the future. By spreading suspicion, small lies, once discovered, have a horrible tendency to corrupt larger truths. On the other hand, overcommunication can be risky as lying. One of the characteristic features of American foreign policy conduct since World War II has been oversell not overkill. It is a variant of Potter's gamesmanship; how to deceive without actually lying. President Truman did not lie when he promoted the United Nations and Marshall plan. He oversold the threat of communism and World War III, and he oversold United Nations membership and the Marshall plan as remedies. President Johnson oversold the threat of North Vietnam (and China) to our world interests; he then oversold each successive expansion of our military involvement.

Congress reacts angrily to credibility gaps, especially to the widening of the gap through oversell. The 1970 controversy over Presidential and congressional war powers is far from unprecedented. Almost exactly 20 years earlier Congress put its prerogatives on the line with almost exactly the same kind of assertions. Much of the debate then focused on the Wherry resolution, which declared that no troops would be stationed in Europe under NATO "pending the adoption of a policy with respect thereto by the Congress."

This kind of controversy is extremely important. It raises fundamental questions that need raising at least once every decade. But more important it raises

questions that may ultimately narrow the credibility gap. We will never get off dead center, we may never close the ceaseless inflationary gap of war in Southeast Asia, unless we eliminate the general distrust that renders every specific step suspect. Because of the widespread distrust in public authority and public officials, America has become a paranoid society. The most sincere, effective steps toward disengagement in Southeast Asia can never be taken so long as thousands of people suspect that such steps are meaningless or mean something different from the official justifications provided for them. Restoring an effective balance between formal powers is one of the most effective means of restoring trust in public authority. And effective means counterpoise; it means confrontation in setting the general contours and standards of foreign policy—in determining real and lasting national interests rather than imagined affronts to international credibility.

Once general trust in public authority is restored, there can be a restoration of the clear constitutional power of the President to run the foreign ministry of the country. But until this is done within well-established constitutional roles and processes, it is unlikely that it will be done very well or at all. There is a derangement of powers at present, and no amount of assertion of presidential rights and prerogatives will right earlier wrongs, however well-founded those assertions may be. History cannot be rewritten, and the past that created distrust cannot be changed. The credibility gap can be reduced, and trust can be restored, only insofar as the people are satisfied that proper constitutional roles and formalities are being carried out, because ultimately these formal means are about the only dependable means of keeping the lying and the overselling to a minimum.

This means a substantial increase in congressional participation in foreign affairs. This increase is desirable for all the previously stated reasons, and it was desirable even before a pro-Congress position served the goal of deescalation in Vietnam. Congress' role must be defined with extreme care. It cannot be done in such a way as to merely serve immediate interests in bringing the Vietnam crisis to an end. It must, in fact, begin with the full recognition that the Presidency is our repository of war and diplomatic powers and that no one or bundle of acts and resolutions is going to alter that fact. Nonetheless, there is an important role for Congress, and the reduction of the credibility gap and the moving of American foreign policy off dead center is very likely to depend on the proper identification of that role.

A step in this direction would begin by reviewing three interrelated developments that account in large part for the decline of congressional relative to executive power in foreign affairs. From this analysis will also emerge realistic steps toward restoration of Congress in the scheme of separation of powers. (1) Congress has delegated—virtually alienated—much of its power in foreign and domestic matters. (2) Congress has, by inaction, failed to check a serious and completely unnecessary drainage of its powers and functions. (3) And most important, Congress has failed to seize opportunities for the exercise of powers that are, as a consequence, hardly being performed at all by any agency of Government.

Delegation

Ever since the rise of big government, Congress has made a practice of alienating its power. Legalistically, this is called the delegation of power, and it amounts in practice to the enactment of "enabling legislation," which provides almost no guidance for the administrator. But Congress has not only given away its powers; it has done so in the worst possible manner. Rather than attempting to maintain its constitutional role by accompanying the delegations with clear standards and guidelines, Congress has sought instead to create new agencies and maintain old agencies with intimate relationships to congressional committees and independent of the President.

In foreign affairs, the congressional practice of maintaining autonomous agencies produced a veritable cascade of action following World War II. Unification never reduced the autonomy of the separate military services, and even went so far as to create a new major service. The original arrangement for the Secretary of Defense did not even include an Office of the Secretary. Congress sought to keep the civilian Secretaries as weak as possible.

Congress gave us a completely autonomous foreign aid program. The debate, the statute itself, and all of the organic documents implementing the Marshall plan made its independence of the State Department unmistakably clear. The same is true, only more so, of the Atomic Energy Commission. Here the intention of congressional intimacy was made still more explicit by the creation of the Joint Committee on Atomic Energy. This relationship continues to this day.

There are still other examples of this kind of subpresidential delegation. But they all add up to the same pattern. Congressional action has, in a sense, put foreign policy and war making powers in a no-man's-land, a Jacob's ladder cut off at the bottom and at the top. While retaining the power to deal on a piecemeal basis with individual agency activity, Congress has, at the same time, prevented the development of a unified and systematic foreign affairs capacity.

Little wonder that there should be a "military-industrial complex." But there is also an atom complex, an international trade complex, a commerce complex, an agricultural complex, and so on. These complexes are simply highly stablized, triangular relationships among a congressional committee, one or more subpresidential agencies, and some private interests of one sort or another. The real world is defined from within these complexes, and it becomes extremely difficult to impose a different definition of reality that would tend to break down the internal values within each complex and replace them with values over which none of the complexes have any control.

Once the pattern is defined this way, it is obvious that Congress must eliminate it in order to take on the kind of power it now seeks. But it is extremely important to recognize that if Congress expands its power by eliminating these complexes, the expansion will not come at the expense of presidential power in foreign affairs. Congressional delegation of power to agencies has not commensurately expanded the Presidency; in fact it has imposed new responsibilities on the office, for which there are never sufficient resources or authority. Thus, if Congress ever really seriously sought to regain a role in foreign affairs, the power of the President would very likely go up, not down. The losers would be the lower level agencies, particularly in the Defense Department. Congressional determination of the criteria that govern the pursuit of national interest would strengthen the hand of the President vis-à-vis his own generals and bureau chiefs while impressing other countries with the determination of the United States to face them and to utilize its resources.

Drainage

Congressional inaction, of course, is not unrelated to delegation. But sins of omission imply inchoate powers, which could reemerge simply in the using. The most dramatic and concrete example of the derangement between the two branches resulting from inaction is the rise of the *executive agreement*. By now, the executive agreement surely enjoys constitutional status. But acceptance of it came during the 1930's, when Congress was giving away everything and the courts were justifying it. And, the Supreme Court in granting the President the right to make such agreements did not suggest that Congress was obliged to accept them.

A thorough examination of the political and legal implications of the executive agreement has never really taken place. The Bricker amendment controversy of the early 1950's raised the question, but the social motives of the Bricker proponents tended to discredit bonafide efforts to evaluate the executive agreement power. The Bricker people were worried about the fact that executive agreements have the status of treaties, and treaties can be a source of Federal domestic power in addition to the express powers of article I of the Constitution. If, for instance, the United States had become party to an international agreement affecting civil rights, the internal obligations of the agreement would have enabled the Federal Government—so it was feared—to legislate on matters for which Congress would otherwise have no constitutional power. The opponents of executive agreements were concerned about States rights, whether their invasion came from a treaty or an executive agreement; they were less concerned about congressional prerogatives and the drainage of congressional power in foreign affairs. Yet, the executive agreement combines the worst features of all the means of conducting diplomacy. It combines the formal and advanced commitment of a treaty with the ambiguous and uncertain status of a diplomatic note.

But the executive agreement is only one manifestation of congressional evasion of its responsibilities to evaluate and guide America's national interest. The role of Congress, especially the House, has indeed expanded through the increased international financial involvement of the United States. However, the appropriations process was never good for anything but the consideration of incremental issues, and a preoccupation with such issues has only succeeded in further blinding Members of Congress to the real issues.

This "appropriations approach," coupled with the above-mentioned preference for agency autonomy, the passive acceptance of executive agreements, and probably a sense of being browbeaten by the executive wrapped in the flag, has prevented any serious parliamentary reexamination of America's posture in the world during the last revolutionary decade or two. As a result, some mighty old doctrines and concepts continue to guide our specific actions, not because we

necessarily believe in them, but because they are all we have. For example, we continue to operate in the world, particularly in Southeast Asia, as though communism were a single, monolithic worldwide conspiracy. Within that context we still tend to view every outbreak of violence and every *coup d'état* in the world as interrelated and cumulative and to assess every outcome in terms of whether it is "a loss to the free world." A major argument for our being in Vietnam on an expanded basis, for example, has been not only the so-called domino theory, but also the assumption that the Vietcong are puppets of the North Vietnamese, that the North Vietnamese are puppets of the Chinese, and that the Chinese and the Russians are running the show together, so that if we can just win there "we've got 'em licked all over the world."

One cannot fail but be appalled by the overwhelming power of unexamined premises. It is these premises more than any economic interest, or any contractual or treaty commitments (or even the prior presence of American troops), that push us on into the Asian Continent. And we hold onto these premises despite the fact that the notion of communism as monolithic was weakened in Yugoslavia, emaciated in Hungary, and annihilated in China, not to mention its drawing and quartering in Africa and the third world, in Czechoslovakia, and Lord knows where else. Although the breach between China and Russia is more profound than any breach we have ever had with our historic allies, at least since the War of 1812, the Congress has never on a full-scale basis examined the possibility that there are many communisms, that nationalism is now a stronger force than communism. In the absence of a full and open reevaluation, even the most sophisticated Members of Congress, the executive branch, and the press frequently refer indiscriminately to any adversaries in Southeast Asia as the "Communists." Body counts refer simply to "2,000 Communists." A prisoner is a "Communist prisoner," whether he is Laotian, Chinese, or Vietnamese. Do all those yellow men really look alike, or is it our racism? I think it is neither. I think it is the blindness imposed by ancient criteria, learned by rote, as to the character of the enemy and the threat against vital national interests.

This is the result of the inaction that has drained so much power away from Congress. Congress cannot have the power to direct a war. But it can define what war is, what the terms of victory are, and, most important, what the stakes shall be. Instead, Congress has allowed the executive, and especially the military, to define the guiding concepts and define the terms of victory. That way we can never win. Winning is a matter of definition. If in order to justify our presence we magnify at each step the stakes and the terms of the conflict, victory becomes unattainable at each step. When we place each conflict in the general context of world Communist conspiracy and then depend on executive agencies, particularly the military, to find ad hoc justifications for particular actions, no limit is set on the character of our burdens. In fact there is an inverse relationship between the scope of the conflict and the scope of the justification: The weaker the adversary the greater the need for justification.

There is no reason in the world why laymen, especially when assembled in Congress, cannot set the parameters of international conflict. War is a specialty, and when the laymen replaces the specialist, he has a fool for a client. But the conditions of victory and the character of the world environment are not the exclusive domain of the specialist. In fact the specialist may be the least qualified for these kinds of judgments.

This is particularly true when we are speaking of the specialists in war and violence. De Tocqueville expressed grave concern about this particular problem in 1830. In aristocracies, he observed, there is a natural and accepted ranking in society, of which the military career is merely a reflection. There is little pressure or competition among officers of noble rank, for the social distinction between captain and major is not so very great. But in democratic armies the pressure of competition for a limited number of upper ranks is extreme, for these ranks are the only source of available status. Thus, he concludes, the urge to put a military definition on ambiguous, diplomatic relationships is far more common in democratic countries. His essay, "Why Democratic Nations Are Naturally Desirous of Peace, and the Democratic Armies of War," is an ungenerous and anachronistic statement of the case. However, what citizen today is willing to stake his life on the ability of the military specialist to set properly the very conditions within which he himself is to operate?

Power unseized and unexercised

If Congress represents a nation desirous of peace, Congress is not bound to oppose all war. But Congress is responsible for establishing political guidelines of military action, and in the past 20 or 30 years the reverse has more often been the

case. Under conditions of crisis, Congress often seeks to do what it cannot do because it will not do what it must. Congress cannot direct this war or any other war. What it can do, and what it has not done, is to set guidelines for direction and limits on the extent of America's commitment.

Congress war powers, like the President's, are lodged in the Constitution. As Corwin observed, "* * * the Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy. And in addition to constitutional powers, there is also ample political support for successful congressional participation.

Congress has the constitutional power, which it has not sought to use, to define the objectives and limits of war. If it has the power to declare war, it also has the power to set the terms of war and the character of victory. In the 20th century, especially since America's emergence as a world power, declared war has come to mean total war, involving a total commitment of population and industrial capacities and, if necessary, the total annihilation of the enemy. But war, including declared war, is a continuum. To treat it otherwise in our age is to combine medieval religious outlooks with modern technology.

Yet, it is Congress that has tended to be the more militaristic and uncompromising, whereas the executive has tended to recognize that war is a continuum. Once American troops are involved in violence abroad, Congress tends to assume a role of protecting the military and adopting its point of view. Some of our most famous military minds are not and have never been military men.

Once war is recognized as a continuum, powers other than the power to declare war become clear. For example, there is no reason why a declaration of war cannot include a number of limiting clauses. Instead of the Tonkin resolution, an unconditional, nondeclaration of war, Congress would have been far better off declaring a conditional state of war. The declaration of war, or resolutions passed in pursuit of such a declaration, could have defined the limited objectives, the limited character of victory, and even the conditions for armistice. By operating as though war must be either nonexistent or total, Congress abdicated its role through the Gulf of Tonkin resolution, until 1970, when the situation had become so intolerable that Congress sought in fact to direct the conclusion of the war rather than to set limits within which the executive and the military could conclude the war. In any case, if a declaration of war does not mean total war, then the congressional declaration could include a number of "wherases" and "now therefores." A state of war is not a state of being but a state of commitment to a certain amount of violence, the degree and character of which are well within the grasp of a body of laymen in Congress assembled.

Some are concerned that the declaration of war is a poor technique for anything short of the actual intent to engage in total war because a declaration of war automatically reduces domestic civil liberties. There is ample basis for such a concern, but it is only as true as we allow it, through inaction, to be. In fact, the very involvement of domestic civil liberties gives Congress' war powers its potentially strong political base as well as an additional source of constitutional power. Let this be put as bluntly as possible: Most of Congress' effective war powers derive from domestic powers.

If total war means total involvement of resources and population, then limited war means limited involvement of resources and population. Congress has the power to limit or expand war and other international involvements by setting limits on the amount of domestic involvement. Such limits are directly effective to the extent that they put resources in the hands of the President and the military. Such actions are also effective in symbolizing to the executive and to the world the degree to which the country intends to be involved.

Two brief examples: In the area of conscription, Congress has turned over virtually total powers to the executive. Manpower requirements and the conditions of recruitment, which should be jealously guarded by a great democratic assembly, are considered means by which Congress serves the military. A second sorry example is the general field of civil liberties, of which conscription is a part, where Congress could guard effectively against the more insidious problems of declared war. True, during our two most important involvements in undefined but real wars—Korea and Vietnam—the right to dissent was in large part maintained. But this was owing far more to solid American traditions and the Supreme Court than to any efforts by the popularly elected branches. On the contrary, what President Truman started in his loyalty program became a route through which Congress virtually tried to define the Korean conflict as an undeclared but total involvement. The House Committee on Un-American Activities is but one of those very important instruments by which Congress has tried internally to

treat limited war as though it were total war by defining internal dissent as internationally relevant.[1] During the Vietnam war, Congress went still further by cynically adding to the civil rights law a totally unconstitutional amendment to make it a crime to organize for dissent. This is the first Federal sedition law since the John Adams administration.

And yet it is in civil liberties that Congress will find political base sufficient "to struggle for the privilege of directing American foreign policy." As De Tocqueville pointed out, and as 20 years of public opinion polls confirm, there are two systems of opinion in the United States, perhaps in any democracy. One system of opinion is nationalistic. It is based on consensus, and, as regards the outside world, is mobilizable and militaristic. The second system of opinion is domestic and libertarian. It is based more on dissent, is selfish, and in a word, noninternationalist. These two systems of opinion are not produced by two entirely different peoples; nor are they the Dr. Jekyll and Mr. Hyde in each of us. Both are essential parts of any country and any people dedicated to its own freedom. But each operates in different contexts, and each responds to different stimuli.

In our constitutional scheme, it was inevitable that the two systems of opinion would attach themselves to different institutions. One of these systems of opinion is attached to the Executive. The other tends to be congressional, though there is little effort by Congress as a body to draw from it.

Tables 4–1 and 4–2 only begin to suggest the profound differences in the two systems of politics. Each table is based on a question asked on virtually every poll taken by the American Institute of Public Opinion concerning how individuals feel in general about the way the President is doing his job. The question is asked regularly and is not timed or pitched according to any particular national or international event. That is, it does not seek a referendum on a particular issue but only a very general feeling about the President at a given point in time.

TABLE 4–1.—THE PRESIDENT'S RELATION TO HIS PUBLIC—INTERNATIONAL EVENTS

Date	Time	"Do you approve of the way the President is handling his job?" Yes (percent)
June 1950	Before Korean outbreak	37
July 1950	After U.S. entry	46
August 1956	Before Israeli, British, French attack on Suez	67
December 1956	After U.S. opposition to the attack	75
July 1958	Before Lebanon	52
August 1958	After U.S. marine landing	58
May 1960	Before U–2 incident	62
June 1960	U–2 debacle; collapse of Summit	68
March 1961	Before Bay of Pigs	73
April 1961	After Bay of Pigs	83
October 1962	Eve of Cuba crisis	61
December 1962	After missile crisis	74
October 1966	Before tour of Pacific	44
November 1966	After tour of Pacific	48
June 1967	Before Glassboro conference	44
June 1967	After Glassboro conference	52

Source: Theodore J. Lowi, "The End of Liberalism" (New York: Norton, 1969) ch. 6, based on polls of the American Institute of Public Opinion (AIPO). See Nelson W. Polsby, "Congress and the Presidency" (New York: Prentice-Hall, 1964), p. 26, and Kenneth Waltz, "Foreign Policy and Democratic Politics" (Boston: Little, Brown, 1967), ch. 10.

[1] There was a recent change of name to House Committee on Internal Security. For more on this issue, see chapter 5.

TABLE 4–2.—THE PRESIDENT'S RELATION TO HIS PUBLIC—DOMESTIC EVENTS

Date	Time	"Do you approve of the way the President is handling his job?" Yes (percent)
May 1947	Before veto of Taft-Hartley (June 20, 1947)	57
July 1947	After veto	54
Late January 1952	Before steel seizure (Apr. 9, 1952)	25
April 1952	After steel seizure	[1] 28
July 1957	Before troops to Little Rock (Sept. 25, 1957)	63
Late October 1957	After troops to Little Rock	57
Early April 1962	Before steel price rollback	77
May 1962	After steel price rollback	73
September 1962	Before troops to Oxford, Miss	67
October 1962	After troops to Oxford, Miss	61
Late May 1963	Before civil rights message	65
Late June 1963	After civil rights message	[2] 61
July 1965	Before medicare passage	69
August 1965	After medicare passage	[3] 65
June 1967	After Glassboro, before Detroit	52
August 1967	After troops to Detroit	39

[1] This survey was taken very soon after Truman announced his retirement. By June, approval of his job had gone up to 32 percent.
[2] In August it was still 61 percent.
[3] Note that 1 month later, in September, approval rate was still the same, 65 percent.

Source: AIPO polls.

These two tables are the result of the following experimental situation. Each item involves some action or event unambiguously associated with the President and his administration. The polls chosen were taken immediately before each action and as soon after the action as polls were available. Inasmuch as no other event of equal importance occurred during the period in question, there seemed some basis for attributing at least some of any observed variance to the events themselves. It should also be emphasized that the analysis does not rest on any single before-and-after example, but with the overall pattern as determined by the repetition of identical before-and-after results.

The results demonstrate that the American public is in fact quite capable of expressing very specific responses within very brief periods of time to important leadership situations. We have what V. O. Key in his posthumous work called "responsible electorate." But it is even more interesting to note the character of that responsibility. On matters of international affairs, an event involving the Presidency received consistently strong supportive responses. No matter what the situation was, no matter whether the event was defined as a success or a disaster, the people tended to rally around the President in significant proportions. A generally agreed on disaster, such as the Bay of Pigs, tended to rally people to the President apparently without regard to their attitude toward the event itself. In fact, that costly adventure seems to have been responsible for helping to bring President Kennedy's support to an almost historic high. But even a less important action, such as President Johnson's 1966 visit with former Premier Ky in the Pacific, bolstered the President's faltering popularity.

The figures in table 4–2 provide a strong contrast. First, domestic leadership actions do not evoke the same degree of responsiveness. But more important, the direction of the responses is almost opposite of those observed on table 4–1. In the eight important instances on table 4–2, there was only one in which support for the President actually increased, and this may have been owing to the fact that the followup survey was taken very soon after President Truman announced his retirement plans. (Two months later he enjoyed the approval of 32 percent of the public.) The 1962 event helps best to show how clearly the public seems to discriminate between a domestic action and an international one. In September 1962, immediately before the dispatch of Federal troops to the University of Mississippi campus, President Kennedy's handling of the job was approved by 67 percent of the sample. Immediately following the occupation of the campus, President Kennedy's standing dropped noticeably to 61 percent. This was mid-October, which happened to be the eve of the Cuban missile crisis. The results of the first AIPO poll following the missile crisis, in December, reveal that general support of the President had jumped well beyond the status quo ante—the Mississippi crisis—to the very high level of 74 percent approval.

These figures strongly bear out the general impression that there are two systems of politics, one international and one domestic. The former is attached to the presidency because it symbolizes sovereignty and international involvement. The latter is congressional to the extent that Congress, the spirit of faction and party, chooses to involve itself in these matters. The political system involved with international affairs is consistently supportive of the Government, and is usually supportive on the basis of a two-thirds and three-fourths consensus. The closer we move to total war the closer we can expect this system to move to total consensus. This would naturally be the case, but consensus is artificially moved still higher through patriotic campaigns, propaganda, and legal suppression of dissent.

The other system is not consistently below majority consensus, but its tendency is always downward. This is an inevitable part of our electoral and local party process; these figures are simply a dramatic representation of the restraint that an active electorate is supposed to put on those who are elected. Congress has an obligation to protect and maintain this system of downward tendencies. But if ever there were a practical and selfish argument for civil liberties, here it is. When at any point it is the opinion of Congress that a war is not a total war, it is the time to express this opinion by expansion rather than contraction of civil liberties. Here is a basis of power as well as a fundamental obligation. Joseph McCarthy, HUAC, and many others have proven clearly enough that it is easy to mobilize public opinion against unpopular dissent, especially when the dissent is connected with international issues. But a full analysis of Congress constitutional power should show that any limitation on dissent eats up Congress own political base. Total war is, of course, the exceptional case of no public opinion and total executive powers. But how often is there total war?

AFTER VIETNAM

It is never sufficient, especially in matters regarding a large democratic assembly, merely to state desirable goals and available powers. Time and again throughout our history we have discovered that good habits must be institutionalized. Congress will never use its constitutional and political powers in an effective foreign policy manner unless it develops a routine and a habit for their use. Thus, what we need is an equivalent in foreign policy to the "automatic stabilizers" built into our domestic economic policy: the Employment Act of 1946, the welfare system, the graduated income tax, monetary powers, and general countercyclical compensatory policy.

The automatic stabilizer in the foreign policy field would have to begin with an organic statute which would require an annual assessment of the state of the world. Pure rhetoric could be avoided by specifying precisely the matters to be covered by the President and by setting up a joint committee, much like the Joint Economic Committee, through which professional papers and regular teach-ins could provide frequent, frank, and unashamed reassessments of such outmoded dichotomies as communism versus the free world.

Congress could require a state of the world report that would go beyond rhetoric. It would include assessments of the state of nationalism in the world and the relation between nationalism and such internationalisms as communism, capitalism, and zionism. Congress could also require that such a report include a review of the status of dissent in this country. Such legislation would require regular evaluation of all laws and practices pertaining to and affecting speech and assembly. It would be ideal if such assessments would lead to regular congressional resolutions regarding the status of the individual in the cold war. Some of the matters might be quite rhetorical, but the habit of self-evaluation would be most healthy, and appropriate rhetoric often does limit future conduct. Such habits would work as though Congress had temporary injunctive powers against the President, suspending and exposing certain practices until the President has fulfilled some kind of "show cause" requirements. The advantage would be that such injunctions would occur regularly and not merely when crisis renders the power impossible to use. Such a process could also be compared to the budgetary process. It would be elaborate, and it would be a year-round endeavor to review the relation between present effort, present resources, and upcoming stress.

Automatic stabilizers could also be built into international economic activity. A profoundly important stabilizer could, for example, be built by statute into American business through the internationalization of large American corporations. Vastly increased foreign holdings of shares in American corporations would inevitably contribute to world political stability. The United States has been no more eager than the Soviet Union or China to cooperate with international political bodies, owing to fear of the loss of sovereignty. But internationalizing our corpora-

tions involves no loss of sovereignty while it is increasing the potential for world stability by increasing actual interdependence and by increasing the credibility of our own commitments to world peace.

Congress also could with very little trouble ease the application of antitrust laws against mergers involving a foreign corporation and a domestic corporation. Hitherto, the Department of Justice has applied these laws with far greater strictness to these than to totally domestic mergers. Congress could also very easily work out programs to encourage more foreign buying of American stock. Precautions against control in certain sensitive industries could easily be written into the statutes.

The purpose of all this, however it might technically be done, would be to introduce the kind of monetary interdependence that was fairly obviously the foundation of what Polanyi has called "the hundred years of peace" of 1814–1914. Countries are far more likely to enter into substantial agreements and to live conscientiously by the terms of those agreements if each country has a substantial stake in the other country. As Polanyi has suggested, the houses of Morgan and Rothschild had more to do with the hundred years of peace than the combined influence of the European armies and the British navy.[4]

There are other automatic stabilizers that a well-motivated imagination could conjure up. Their enactment is Congress's power and obligation. And they should be contrived for the future and not designed for the particular crisis at hand. And their desirability should be obvious to anyone who appreciates the extent to which the whole of the American constitution is built on the principle of automatic stabilizers. Separation of powers, check and balances, federalism, bicameralism are the most formal of the stabilizers built into the system as faith that better government has a better chance when it is the outcome of confrontation.

Confrontation between the Executive and Congress is both natural and desirable, in foreign as well as domestic policymaking. One source of serious error after World War II was bipartisanship, largely because it shackled Congress in its relations with the President. Bipartisanship declared open confrontation off limits; this contributed to the direct delegation of power to the lower level agencies and nonpolitical bureaucrats without adding power or legitimacy to either the President or Congress. A careful study of the history of bipartisanship would tend strongly toward the conclusion that confrontation is better than cooperation between President and Congress. Such a review would also support the proposition that an independent Congress boldly exercising its war and peace powers is far more dependable and effective than the party system in governing America's international conduct. Parties as suggested by bipartisanship, are not dependable in the foreign policy area. No better instance of this can be found than the present situation regarding the Vietnam war. Each pot has called the other kettle black, and they are both correct. Parties are good to a limited extent in inflicting electoral punishment, to use Kenneth Waltz' felicitous term, on the international policies of the party in power.[5] But this method is not regular and dependable. More important, it is not a constitutional process, and therefore in addition to being undependable and ineffective it also grants little legitimacy to antiwar dissent until the war drags on long enough to make attacks on it a matter of political advantage. When those who made the war, later attempt to assume a dovish leadership in opposition, they are simply not very plausible. A more independent Congress might have encouraged some of these people to resign and take their case to the public at a time when their opposition might have meant something. To wait for their party to leave office to say they were the original peaceniks is neither appropriate nor effective.

As a political institution Congress is, of course, capable of the same kind of opportunism. But it is also true that Congress has always been more noninterventionist than the President. If somehow that kind of spirit can be turned into a mature and subtle restraint rather than kind of flipflop between isolationism and jingoism, we would ultimately develop the kind of responsible American foreign ministry that the world waits for.

It has been said that the military fights current wars with the strategies of each previous war. Congress' obligation is to fight current wars with the concerns of the next. Otherwise, there will be no system within which to realize the hopes for which wars are supposedly fought.

This is what the present constitutional debate is, or should be, all about. Long periods of preparedness—which in our day we call cold war, limited war, police action, and so on—are a serious threat to democracy. Preparedness means mo-

[4] Karl Polaynyi, *The Great Transformation* (Boston: Beacon Press, 1957).
[5] Kenneth N. Waltz, *Foreign Policy and Democratic Politics* (Boston: Little, Brown, 1967), ch. 10.

bilization, and mobilization means limitation of personal freedom. At some point in a long period of preparedness, a people can lose the habit of freedom. And this spells out the dual obligation of Congress in foreign policy. Congress must seek, and has the power to seek, to protect democracy from cold war. And Congress must simultaneously seek to use democracy to set directions and limits on our preparedness. When these two obligations, and their concomitant power, are used to reinforce each other, Congress is obviously performing in a way ideally suited for a mature democratic participation in world affairs.

Statement by Professor W. T. Mallison, Jr., National Law Center, the George Washington University, Washington, D.C.

I appreciate your invitation to submit a further statement to supplement my direct testimony to the subcommittee of June 23, 1970.

It seems appropriate at this particular time to stress the fact that effective congressional participation with the executive branch in exercising the war and peace powers under the Constitution is dependent upon the Congress obtaining a full and accurate flow of information upon which to act. Any legislation defining more specifically the respective authorities of the President and the Congress will not achieve the desired result without also providing that *all* pertinent information must be available to the Congress prior to the time its action is required. There is now a widespread recognition that the Congress did not have adequate factual information at the time it adopted the Southeast Asia Resolution in 1964 and that had such information been available, its action might well have been quite different.

The conflict situation in Southeast Asia is apparently moving toward termination now, and the opportunity for the Congress is to exercise a more effective decisional role in the future. The pressing problem now is the question of lack of, or distorted, information (such as the "Pentagon Papers" are revealing in the Vietnam situation) concerning the Middle East conflict. Should not the Congress be moving to discover the accurate information concerning our involvement in that area over the past five decades since Woodrow Wilson sent the King-Crane Commission to ascertain the facts concerning Palestine in 1919? This is essential if the United States is to avoid accelerating the military conflict there which could well lead to a third World War. The conduct of diplomacy and the promotion of peace rather than war can only be served by a fully informed Congress and not by secret executive branch manipulations.

In summary, the entire constructive role of the Congress is dependent on its obtaining complete information before it makes decisions. Access to such information, therefore, must be a preeminent part of any new legislation concerning the war powers. In addition, it is extremely important that the members of Congress and key staff members take the time to study existing crucial material which is now available. For example, the material published in *Foreign Relations of the United States* is particularly enlightening and relevant to our participation in the middle East. The most recent volumes on this subject are Volume VII for 1946 and Volume VIII for 1945, each of which is entitled "The Near East and Africa." This revealing material has not been sufficiently considered by the Congress and has been completely ignored by the mass media of communication.

Statement by Prof. Lawrence Velvel, School of Law, University of Kansas, Lawrence, Kans.

In recent months, representatives of the executive branch, a number of Federal legislators, certain academic figures and others have opposed judicial or legislative intervention into the course of the Indochina war. Their arguments have sometimes been political in nature, but at other times have been based upon their reading of the Constitution. I am therefore writing this letter in order to provide a reaffirmation of the fact that there are constitutional lawyers who feel quite differently than the above-mentioned persons. There are many constitutional lawyers who believe that in order to uphold the Constitution there should be both judicial and legislative intervention into a disastrous Presidential war, and who further believe that such intervention may well be critical to the future of the Nation.

In recent years our Nation has seen a terriple erosion of the powers of Congress, with a concomitant aggrandizement of the military and foreign relations power of the Executive. In this way the constitutional balance of power was undermined. This created great danger for the Nation, as illustrated by the fact that an unchecked executive branch got us into, and kept us in, the war in Indochina. Moreover, no one should think that the unpopularity of the Indochina war means that the possibility of a President unilaterally getting us involved in war has been exhausted with Vietnam. Such thinking is illusory and dangerous. There have been many unpopular wars in the past, yet Presidents have continued to get the Nation involved in new wars. The Korean war was highly unpopular by the time it was over, yet, less than 2 years after it was finished, the Executive, prodded by Vice President Nixon among others, came close to intervening in Indochina on behalf of the French. Twelve years after Korea, the Executive did get us massively involved in Vietnam—a war which is now the longest and one of the most costly in American history. In the autumn of 1969, when the outcry against the war was at a tremendously high pitch, it was discovered that the Executive was fighting a secret war in Laos. In 1970, when the war was supposedly being wound down, the Executive mounted a large invasion of Cambodia. Today the Executive is apparently still engaged in large-scale bombing in Laos and Cambodia.

Moreover, the facts of realpolitik indicate that this kind of history can repeat itself. This country has military treaties with many nations, treaties which call for the use of force in certain circumstances. However, the precise circumstances are subject to dispute and, as occurred in Vietnam with regard to SEATO, the Executive might interpret a treaty as requiring the use of force even though others strongly disagree. Over the course of the last two decades, executive officials have constantly made belligerent statements toward other nations. Executive officials have sometimes been fixated upon the desire to prevent Communist governments from taking or holding power, and they have sometimes sponsored the use of force to prevent this. They have often felt that force resolves problems and, in general, they have often shown themselves too willing to agree to disastrous plans put forth by the military.

With political facts such as these in mind, and with the example of history to boot, it should be quite obvious that the executive might get us into future unnecessary wars if left to its own devices. Thus, it is critical that the judiciary and the Congress establish judicial and statutory precedents against unilateral executive warmaking. To some extent, the Congress has already created precedents by enacting restrictions that prevent money from being used to finance ground combat forces in Laos, Thailand or Cambodia. This, however, is not nearly the same as restricting the use of moneys in Vietnam itself, where American ground forces are fighting. As for the courts, they have done far less than the Congress. The Supreme Court has consistently refused to hear legal challenges to the war, arbitrarily giving no reasons whatever for its refusal. Lower courts have by and large refused to rule on the legality of the war, although a few courts have recently shown themselves willing to deal with this problem.

Despite the courts' prior general reluctance to deal with the war, it is my hope that in the near future the judicial climate will change in a way that will enable

us to obtain a judicial ruling against the legality of unilateral executive war-making. I might tell you of two efforts which are directed toward attaining this end. First, at the request of Rev. John Wells, who originated the Massachusetts antiwar bill and with whom I was associated in efforts to pass that bill, the Constitutional Lawyers' Committee on Undeclared War has been formed, with myself as chairman. The committee, which numbers almost 40 members, has filed and will continue to file legal briefs in cases challenging the constitutionality of the war. Second, I have just published a book entitled "Undeclared War and Civil Disobedience," which I hope will also make a contribution toward changing the legal climate. The book, which has a foreword by Prof. Richard Falk of Princeton University, sets out in detail my views on why the war is unconstitutional and why it is critically important that courts deal with the merits of this question. The book discusses almost all the arguments which have been put forth on these subjects and finds the Executive's arguments wanting. If you wish, the publisher would be delighted to send you a complimentary copy of the book. The publisher is the Dunellen Co., 145 East 52d Street, New York, N.Y. 10022. You can either write the Dunellen Co. directly or let me know that you want a copy and I will see that one is sent to you.

In conclusion, let me say that you can feel free to use this letter in any way you want, including inserting it in the Congressional Record. Despite the administration's efforts to suppress the issue of the war, the questions of its political wisdom and constitutional legality are among the paramount issues of the day—I think they are *the* paramount issues of the day—and everything possible should be done to keep these questions in the forum of public discussion.

(Submitted for the Record by Mr. Stevenson)

Statement of Hon. William P. Rogers, Secretary of State before the Senate Foreign Relations Committee, May 14, 1971

Congress, the President, and the War Powers

I. Introduction

It is, as always, my privilege to appear before this committee. I am grateful to you, Mr. Chairman, and to members of the committee for the opportunity to testify on the serious questions under consideration.

The committee has helped stimulate an important examination of the war powers of the President and Congress under our Constitution. This administration, of course, fully respects Congress' right to exercise its constitutional role in decisions involving the use of military force and in the formulation of our Nation's foreign policy. We realize that under our constitutional system, decisions in this vital area should reflect a common perspective among the legislature, the executive, and the electorate so that each may play its proper role. We also recognize that this common perspective can only be built through cooperation and consultation between the legislative and executive branches. Generally speaking, the constitutional process so wisely conceived by the Founding Fathers has worked well throughout our history. Any attempt to change it should be approached carefully and should be subjected to long and full consideration of all aspects of the problem.

The issue before us involves the constitutional authority to commit forces to armed combat and related questions. These questions have been the subject of considerable debate and scholarly attention.[1] Unfortunately, they are often approached polemically with one side arguing the President's constitutional authority as Commander in Chief and the other side asserting Congress' constitutional power to declare war—the implication being that these powers are somehow incompatible. The contrary is true. The framers of the Constitution intended that there be a proper balance between the roles of the President and Congress in decisions to use force in the conduct of foreign policy.

In discussing these issues with you today, I wish first to review the historical background of the war powers question, beginning with the Constitution itself and tracing the practice of the Nation throughout our history. I would then like to place the war powers issue in the modern context and discuss with you the factors which I see bearing on the issue of the exercise of Presidential and congressional powers now and in the foreseeable future. Finally, from this perspective I will describe what I believe the national interest requires in terms of a proper balance between the President and the Congress.

First, let me stress that cooperation between the executive and legislative branches is the heart of the political process as conceived by the framers of the Constitution. In the absence of such cooperation, no legislation which seeks to define constitutional powers more rigidly can be effective. Conversely, given such cooperation, such legislation is unnecessary. Obviously there is need for and great value in congressional participation in the formulation of foreign policy and in decisions regarding the use of force. But, at the same time, there is a clear need in terms of national survival for preserving the constitutional power of the President to act in emergency situations.

[1] *See generally*, Background Information on the Use of United States Armed Forces in Foreign Countries, House Comm. on Foreign Affairs, 91st Cong., 2d Sess. (Comm. Print 1970) (hereinafter cited as Background Info. 1970); Documents Relating to the War Power of Congress, the President's Authority as Commander in Chief and the War in Indochina, Sen. Comm. on Foreign Relations, 91st Cong., 2d Sess. (Comm. Print July 1970) (hereinafter cited as Docs. on the War Power 1970); Hearings on Congress, the President, and the War Powers before the Subcomm. on Nat'l Security Policy and Scientific Dev., House Comm. on Foreign Affairs, 91st Cong., 2d Sess. (Comm. Print 1970).

II. Historical Background

A. TEXTUAL AUTHORITY AND THE INTENTION OF THE FRAMERS

Let me turn, then, first to the historical background beginning with the Constitution. Article I, section 8, of the Constitution grants Congress a number of specific powers relevant to our discussion, including the power "to * * * provide for the common Defense * * *; To declare War * * *; To raise and support Armies * * *; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces * * *." The Senate, in particular, is given certain foreign relations powers to advise and consent to treaties and to the appointment of ambassadors and other officials.[2] Congress has the power to make all laws which are necessary and proper for carrying out powers vested by the Constitution in the Federal Government.[3] In addition, Congress has the sole authority to appropriate funds [4]—a vital power in the war powers and foreign relations area.

The powers of the President which are relevant to this inquiry are found in article II. The President is vested with the Executive power of the Government, he is named Commander-in-Chief of the Army and Navy, and is required to "take Care that the Laws be faithfully executed." [5] From these powers and the power to make treaties and to appoint and receive ambassadors is derived the President's constitutional authority to conduct the foreign relations of the United States.

The framers of the Constitution were not writing in a historical or political vacuum. Experience during the colonial period and under the Articles of Confederation had shown the need to strengthen the central government. The problem was to create a strong federal system and yet prevent tyranny.[6] Accordingly, the framers established three powerful Federal branches of government and depended upon the independence of each branch and their coequal powers to provide the checks and balances necessary to preserve the democracy.

The division of the war powers between the legislitive and executive branches is illustrative of the general constitutional framework of shared powers and checks and balances. By this division, the framers changed prior U.S. practice under the Articles of Confederation where the "sole and exclusive right and power of determining on peace and war" had been vested in the Legislature.[7] They wished to take advantage of executive speed, efficiency, secrecy and relative isolation from "public passions." [8] At the same time, they wished to avoid the dangers to democratic government exemplified by the unchecked British monarch who, as Hamilton noted, had supreme authority not only to command the military and naval forces, but also to declare war and to raise and regulate fleets and armies.[9] Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the initiation of hostilities be made not by the President alone, nor by the House or Senate alone, but by the entire Congress and the President together.[10] Yet it is also clear that the framers intended to leave the President certain indispensable emergency powers.[11]

The grant to Congress of the power to declare war was debated briefly at the Constitutional Convention and that well-known debate reveals the essential intention of the framers. The Committee of Detail submitted to the general convention a draft article which gave the Congress the power "to make war."

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[2] U.S. Const. art II. § 2.
[3] *Id.* at art I, § 8 cl 18.
[4] *Id.* at art I, §§ 7, 8 cls 1, 2, 12 and 9 cl 7.
[5] *Id.* at art II, §§ 1-3.
[6] Solberg, The Federal Convention and the Formation of the Union of the American States, at sc (1958).
[7] Articles of Confederation of 1781, art IX. This consolidation of power in the Legislature was principally intended to put the war powers in the hands of the central government rather than the states, except in certain specified emergencies. A division of the war power between Congress and the President was not at issue, for the fear and dislike of monarchy was so great among the colonists that the Articles did not provide for an independent Executive branch. Had the framers intended to give Congress exclusive control of the war powers they could have incorporated the same war powers provision into the Constitution.
[8] *See* The Federalist Nos. 70-75 (J. Hamilton ed. 1864) (A. Hamilton) ; *id.* No. 49, at 390-92 (A. Hamilton); *id.* No. 63, at 476-77 (A. Hamilton).
[9] *Id.* No. 69, at 516.
[10] II M. Farrand, The Records of the Federal Convention of 1787, at 313, 318-19 (1911). "The power of the President with regard to a declaration of war does not end with the functions of communication or information, and of recommendation. A declaration of war, like any other bill, order, resolution, or vote requiring the concurrence of both houses of Congress, must be submitted to the President for his approval or disapproval." Berdahl, War Powers of the Executive in the United States 95 (1921).
[11] Farrand, *supra* at 313, 318-19. That the scope of these emergency powers was controversial from the beginning is evidenced by Hamilton's vigorous attack on President Jefferson's conservative interpretation of his defensive powers in his conduct of the limited war with the Barbary Pirates in 1801. *See* note 16 *infra*.

Pursuant to a motion by Madison and Gerry, this was amended to the power "to declare war." This change in wording was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—"to repel sudden attacks" and also to avoid the confusion of "making" war with "conducting" war, which is the prerogative of the President." [12]

The necessity to repel sudden attacks was the case cited by the framers in which the President clearly had power to act immediately on his own authority. That was the one situation, in 1787, in which it was evident that emergency action was required. But I submit that the rationale behind the concept is broader—that is, that in emergency situations the President has power and a responsibility to use the armed forces to protect the Nation's security.[13] This conclusion is borne out by subsequent practice and judicial precedents, as I will show later. In fact, much of the debate at the time centered on the need to curb the European monarch's tradition of precipitating offensive wars and to transfer to the Federal Government the war powers previously exercised by the States; little attention was given to the scope of the President's power to use the Armed Forces for defensive purposes to protect the Nation or its security interests.[14]

The constitutional division of authority in the war powers area, as I see it, parallels the constitutional balance between the executive and legislature in other fields. By dividing these powers between the two branches, the Constitution established a system that, except in emergency situations, would function most effectively if decisions to involve the Nation in armed conflict were arrived at jointly by the President and Congress.

B. SELECTED HISTORICAL EXAMPLES

In addition to the textual authority and the framers' intentions regarding the war powers of Congress and the President, we should consider the practical exercise of those powers since the Constitution was adopted. Many scholars have reviewed the historical records [15] and I do not intend to cover all of this ground again. I think it is important, however, to identify the trend which developed.

From the earliest years of the Republic we find examples of Presidential use of the Armed Forces without congressional approval. These were, at first, very limited in character. For example, in 1801 President Jefferson sent on his own authority a squadron of ships to protect American vessels from the Barbary pirates, but he authorized them to take only defensive actions.[16] The scope of Presidential initiative expanded during the 19th and early 20th centuries. President Polk sent American forces into the disputed territory near the Rio Grande in January 1846, where they engaged in battle with the Mexicans purely on Presi-

[12] Farrand, *supra* at 313, 318–19.

[13] For example, the President's power to repel sudden attacks undoubtedly includes the power to provide against the imminent threat of attack. This concept was recognized early in connection with Congress' constitutional power to call forth the militia to repel invasions. In Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) Justice Story found constitutional the Act of Congress of 1795 which empowered the President to call forth the militia if the country were invaded or in imminent danger thereof. "[T]he power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil." *Id.* at 28. *See also* Durand v. Hollins, 8 F. Cas. 111 (No. 4186) (CCSD NY 1860) recognizing the Executive's emergency power and duty to respond quickly to threats against the lives and property of American citizens abroad. The origin of the notion, set forth in the *Durand Case*, that citizens have a right to protection abroad is unclear. It is listed as an unquestionable privilege of federal citizenship in the Slaughter-House Cases, 83 U.S. 36, at 79 (1872) with no authority given and mentioned also in In Re Neagle, 135 U.S. 1, at 64 (1889). *See also* 22 U.S.C. §§ 1731–32. For authority that this is more properly a matter within the Executive's discretion, see E. M. Borchard, The Diplomatic Protection of Citizens Abroad 29–30 (1928).

[14] R. Russell, The United States Congress and the Power to Use Military Force Abroad, Apr. 15, 1967, at 25–63 (unpublished thesis in Fletcher School of Law and Diplomacy Library); *see* The Federalist No. 4, at 65–70 (J. Hamilton ed. 1864) (J. Jay).

[15] *See, e.g.*, R. Russell, *supra* at 64–389.

[16] J. Rogers, World Policing and the Constitution 46–47 (1945); Background Info. 1970, *supra* at 40. In his first annual message to Congress on December 4, 1801, Jefferson explained his actions: "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight." II Annals of Cong. 12 (1801) Jefferson's conservative interpretation of his war powers, even against a declared adversary, was vigorously attacked by Hamilton. In his view, once the nation is attacked or war is declared by a foreign nation, the President is authorized to respond with whatever force he thinks necessary. "[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary." 7 Works of Alexander Hamilton 746–47 (J. Hamilton ed. 1851) (emphasis in original); *see* Wormuth, The Vietnam War: The President versus the Constitution in 2 The Vietnam War and International Law 723–25 (Falk ed. 1969). Hamilton's view received judicial approval in The Prize Cases, 67 U.S. (2 Black) 635 (1863).

dential authority.[17] In 1900 President McKinley sent 5,000 troops to China without congressional authorization to protect Americans and help put down the Boxer Rebellion.[18] President Theodore Roosevelt on his own authority dispatched gunboats to the Canal Zone area.[19] Later, Presidents Roosevelt, Taft, Wilson, and Coolidge intervened and temporarily occupied other Latin American and Caribbean countries without prior congressional approval.[20] Nicaragua, for example, was occupied and, in effect, administered by U.S. Marines for nearly 7 years, from 1926 to 1933. Congressional approval was never requested.[21]

This history shows an increasing exercise by the President of his constitutional powers to use American Armed Forces abroad, without the prior authorization of the Congress. And yet there was remarkably little complaint from the Congress. It is interesting to speculate why this was so. It seems to me there may have been several possible factors. In the first place, I suppose that Presidents were acting in the context of a generally popular consensus in the country that the United States should assume a posture consistent with its emerging power, particularly in the Western Hemisphere. Second, a large majority of the 19th and early century presidential actions occurred in the Caribbean, where this country's power was so predominant that there was little or no chance of forcible response to our actions. Therefore, the risks to the nation which article I, section 8, was designed to reduce never arose. In short, there being no risk of major war, one could argue there was no violation of Congress' power to declare war.[22]

It has been suggested that even Franklin Roosevelt's executive agreements in 1940–41 with Britain effecting an exchange of destroyers for bases in the Western Atlantic and agreements with Denmark and Iceland for bases in Greenland and Iceland can be considered a legitimate exercise of hemispheric defense.[23] However, the factor distinguishing these agreements from prior presidential actions in the Western Hemisphere was that in 1940–41 there was most unmistakably a great risk that the United States would become involved in a major war.

I cite these historical precedents not because I believe they are dispositive of the constitutional issues your committee is considering—far from it—but to illustrate how the constitutional system adapts itself to historical circumstance. Whatever the reasons for presidential initiatives during this period, they seem to have been responsive to the times and to have reflected the mood of the Nation.

You are, of course, equally familiar with the post-World War II history surrounding the exercise of war powers by the President and the Congress.

At the invitation of the Government of the Republic of Korea and pursuant to resolutions of the United Nations Security Council, President Truman committed over a quarter million of air, naval and land forces to a war in Korea without Congressional authorization.

The Truman administration based its authority to commit these troops squarely on the President's constitutional authority. It asserted that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof."[24] Citing past instances of presidential use of armed force in the broad interests of American foreign policy, the administration asserted that there was a "traditional power of the President to use the Armed Forces of the United States without consulting Congress."[25] Reliance was also placed on the fact that the action was taken under the United Nations Charter, a part of both the treaty and international law which the President is constitutionally empowered to execute.[26]

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[17] Wormuth, *supra* at 726; Rogers, *supra* at 48–49; Background Info. 1970, *supra* at 30. Although the Mexican War subsequently became a declared war, Act of May 13, 1846, ch. 16, 9 Stat. 9, there was some initial Congressional opposition. *See* 15. Cong. Globe, 29th Cong., 1st Sess. 782–88 (1846). This opposition had so increased two years later that the House passed a rider to a resolution honoring Gen. Taylor reading "that the war was unnecessarily and unconstitutionally begun by the President of the United States." A subsequent motion to strike the rider was defeated. *See* 17 Cong. Globe, 30th Cong., 1st Sess. 95, 343–44 (1848).

[18] Rogers, *supra* at 58–62; Background Info. 1970, *supra* at 40.

[19] Rogers, *supra* at 73–74; Background Info. 1970, *supra* at 41; S. Bemis, A Diplomatic History of the United States 513–15 (4th ed. 1955).

[20] Rogers, *supra* at 74–78; Wormuth, *supra* at 748–49; Bemis, *supra* at 519–38.

[21] Rogers, *supra* at 77–78; Background Info. 1970, *supra* at 43.

[22] Note, Congress, the President and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, at 1790 (1968).

[23] Henry Steele Commager, Hearings on S. 731 before the Senate Comm. on For. Rel., 92d Cong., 1st Sess. (Mar. 8, 1971). The statement is based on the assumption that the President's emergency powers can, under certain circumstances, encompass hemispheric defense as a necessary correlative of his power to defend the United States, its territories and possessions.

[24] U.S. Dept. of State, Authority of the President to Repel the Attack in Korea, 23 Dept. State Bull. 173 (1950).

[25] *Id.* at 174.

[26] Powers of the President to Send the Armed Forces Outside the United States, Sen. Comms. on For. Rel. & Armed Serv., 82d Cong., 1st Sess., pp. 2–3, 20–22 (Comm. Print Feb. 28, 1957).

President Eisenhower sought congressional authorization for possible engagement of American forces in the Middle East [27] and in the area around Formosa.[28] In his request for a resolution on Formosa he stated his view that:

"Authority for some of the actions which might be required would be inherent in the authority of the commander in chief. Until Congress can act I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.

"However, a suitable congressional resolution would clearly and publicly establish the authority of the President as commander in chief to employ the Armed Forces of this Nation promptly and effectively for the purposes indicated if in his judgment it became necessary." [29]

When President Eisenhower sent 14,000 troops into Lebanon in 1958 he did so without seeking specific congressional approval and without specifically basing his authority on the 1957 Middle East resolution. He said that the troops were sent "to protect American lives—there are about 2,500 Americans in Lebanon—and by their presence there to assist the Government of Lebanon to preserve its territorial integrity and political independence." "I have," he said, "come to the sober and clear conclusion that the action taken was essential to the welfare of the United States. It was required to support the principles of justice and international law upon which peace and a stable international order depend."[30]

In 1962 President Kennedy ordered the quarantine of Cuba, "acting under and by virtue of the authority conferred upon me by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the U.S. Congress and the Organ of Consultation of the American Republics, and to defend the security of the United States. * * * " [31] The resolution of Congress referred to by the President was passed 1 month before the Cuban missile crisis and the quarantine proclamation. The Cuban resolution, unlike the other area resolutions contained no grant of authority to the President; it simply declared that the United States was determined to use any means necessary to prevent Cuba from extending its subversive activities through the hemisphere and from creating or using an externally supported military capacity which would endanger U.S. security.[32]

In April 1965 President Johnson sent U.S. Marines into the Dominican Republic without congressional authorization, and stated initially that he was exercising the President's power to protect the safety of American citizens.[33] A few days later when the peacekeeping objectives of the action became predominant, he explained his action as an exercise of the President's power to preserve the security of the hemisphere in accordance with the principles enunciated in the OAS Charter.[34] At no time during the Dominican action did the President seek congressional authorization.

When President Johnson began sending American combat troops to South Vietnam in 1965, he relied as authority for his action, on a combination of his own constitutional authority as Chief Executive and commander in chief, the Senate's advice and consent to the SEATO treaty, and the authority granted by the Congress in the Tonkin Gulf resolution.[35]

Looking back then over the last 20 years, one can see that Presidents have given varying rationales for executive action and varying interpretations of the necessity of congressional authorization.

I think there are two points to be made regarding this period of our history. First, certainly the area resolutions were some evidence of congressional approval. Usually, however, they arose in an atmosphere of crisis or else in a different factual context than that in which they were eventually relied upon. The question is not whether these resolutions are useful to Presidents—of course they are—but instead whether such open-ended delegations are an effective means for Congress to exercise its constitutional authority.

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[27] Pub. L. No. 85-7, § 2, 71 Stat. 5 (Mar. 9, 1957), as amended by Sec. 705 of the Foreign Assistance Act of 1961, 75 Stat. 424 (1961).

[28] Pub. L. No. 84-4, 69 Stat. 5 (Jan. 29, 1955).

[29] 101 Cong. Rec. 601 (Jan. 24, 1955).

[30] 104 Cong. Rec. 13, 903-04 (1958) for July 15, 1958 statement of the President.

[31] Pres. Proc. No. 3504, 27 Fed. Reg. 10, 401 (Oct. 23, 1962).

[32] Pub. L. No. 87-733, 76 Stat. 697 (Oct. 3, 1962).

[33] *See* N.Y. Times, Apr. 29, 1965, at 1, col. 8; *id.* Apr. 30, at 1, col. 8.

[34] *See* Statement by the President, May 2, 1965 in N.Y. Times, May 31, 1965, at 10, col. 1. The OAS subsequently authorized a multi-nation peacekeeping force.

[35] U.S. Dept. of State, The Legality of United States Participation in the Defense of Viet-Nam, 54 Dept. State Bull. 474 (1966). The Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (Aug. 10, 1964) *repealed by* Pub. L. No. 91-672, § 12 (Jan. 12, 1971) provided that "the Congress approves and supports the determination of the President, as Commander-in-Chief, to take all measures necessary to repel any armed attack against the forces of the United States and to prevent further aggression," and that "the United States is . . . prepared, as the President determines, to take all necessary steps, including the use of armed force."

Second, it serves no useful purpose to argue today whether or to what extent past presidential decisions regarding the use of military force have served the national interest. The very concept of that which best serves the national interest of the United States has undergone significant change since the uses of force of the 1950's and 1960's. The Nixon doctrine represents a recognition that protection of our national interest does not require an automatic U.S. military response to every threat. The aim of the Nixon doctrine is to increase the participation of other nations in individual and collective defense efforts. While reaffirming our treaty commitments and offering a shield against threats from nuclear powers aimed at our allies or other nations vital to our security, we now look to the nation directly threatened to assume the primary responsibility for providing the manpower necessary for its defense. I am sure this new approach will be of great help in achieving balanced executive-legislative participation in decisions regarding the use of military force.

C. JUDICIAL PRECEDENTS

Let me turn now briefly to an examination of judicial precedents in the war powers area. There are relatively few judicial decisions concerning the relationship between the Congress and the President in the exercise of their respective war powers under the Constitution. The courts have usually regarded the subject as a political question [36] and refused to take jurisdiction. For example, in *Luftig* v. *McNamara*, the District of Columbia Court of Appeals upheld the dismissal of a suit by an Army private to enjoin the Secretary of Defense from sending him to Vietnam on the ground that the war was unconstitutional. The court stated:

"It is difficult to think of an area less suited for judicial action than that into which appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the executive. * * *" [37]

Accordingly, to the extent issues regarding the war powers are resolved, their resolution is likely to come, as has been the case in the past, through political interaction of the President, Congress, and the electorate. And, in the final analysis, that is the most appropriate means for the settlement of fundamental constitutional questions of this character.

There are, however, a few court decisions which contain expressions of judicial opinion relevant to the war powers issue. These cases suggest some rough guidelines. First, the decisions indicate that courts recognize and accept the President's authority to employ the Armed Forces in hostilities without express congressional authorization.

For example, in *Durand* v. *Hollins*, [38] the second circuit held in 1860 that in the absence of congressional authorization, the Executive had broad discretion in determining when to use military force abroad in order to respond quickly to threats against American citizens and their property. In the *Prize* cases [39] during the Civil War, the Supreme Court upheld President Lincoln's Southern blockade despite the absence of a declaration of war or other specific congressional authorization. The Court held that when war is initiated by the other party, the President is not only authorized but obliged to resist force by force and has broad discretion in deciding what measures are demanded by the crisis. The decision was also based on the Court's finding of a general congressional sanction of the war from ancillary legislation and subsequent congressional ratification.

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[36] Massachusetts v. Laird, *motion for leave to file complaint denied*, 400 U.S. 886 (1970); Mora v. McNamara, 387 F. 2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Mitchell v. United States, 369 F. 2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967). The Political Question has been defined as a question which the Constitution requires to be determined by an agency of government other than the judiciary. *See generally*, A. Bickel, The Least Dangerous Branch (1962); H. Wechsler, Principles, Politics and Fundamental Law 3–48 (1961); Scharpf, Judicial Review and the Political Question: A Fundamental Analysis, 75 Yale L. J. 517 (1966); Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 U.C.L.A. L. Rev. 1135 (1970); Brief for Defendant at 35–41, Massachusetts v. Laird, *supra*.

[37] Luftig v. McNamara, 373 F. 2d 664, at 665–66 (D.C. Cir. 1967).

[38] 8 F. Cas. 111 (No. 4186) (CCSD NY 1860), involving a suit for damages against a Navy Commander who on orders of the President and Secretary of the Navy, bombarded and burned the city of Greytown, Nicaragua in retaliation against a revolutionary government which refused to make reparation for damage done there to U.S. citizens and their property. Mr. Justice Nelson (on assignment to the second circuit) decided in favor of the defendant; the case never reached the Supreme Court. *Cf.* Perrin v. United States, 4 Ct. Cl. 543 (1868).

[39] 67 U.S. (2 Black) 635, 665 (1862), involving suits by four shipowners alleging their ships had been illegally seized as prizes under President Lincoln's blockade against the Confederacy. The Court held the blockade legal. Mr. Justice Nelson and three others dissented, arguing that the President had no authority to impose a blockade and seize the property of U.S. citizens without a congressional declaration of war.

The *Steel Seizure* case, *Youngstown Sheet & Tube Co.* v. *Sawyer*,[40] in which the Supreme Court held invalid President Truman's seizure of the steel mills during the Korean war, is sometimes cited as indicating the limits of the President's independent constitutional authority. However, it is important to note that the precise issue in that case was not the President's authority to conduct hostilities but the scope of his power over a clearly domestic matter—labor-management relations. Moreover, the Court noted and several Justices based their concurring opinions[41] on the fact that Congress had enacted a number of laws concerning domestic labor disputes and in so doing explicitly withheld the power of seizure from the President.

This aspect of the *Steel Seizure* case leads to a second observation: That throughout our history a headon collision between legislation and Presidential action has rarely, if ever, occurred in the field of foreign policy.[42] This is a testament to the strength and flexibility of our system, and to the statesmanship of the Nation's leaders.

There are few judicial pronouncements on what would happen in the event of a clear collision in the area of the war powers. In *Ex Parte Milligan*[43] the concurring opinion of four Justices indicated there were limits to what Congress might do by legislation:

"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief." [44]

But perhaps Justice Jackson stated the wisest rule when he said that in the event of a clear collision between legislation and Presidential action "* * * any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." [45]

A third guideline that emerges is that when acts of Congress authorize Presidential action, the President's power is at its zenith; it encompasses both the authority delegated to him by Congress and whatever independent constitutional authority he may have with respect to the subject matter. It is in this third situation that we find the much-quoted case of *United States* v. *Curtiss-Wright Export Co.*,[46] in which the Supreme Court held that the normal legal restrictions upon congressional delegations of power to the President in domestic affairs do not apply with respect to delegations in external affairs because of the Executive's extensive independent authority in that realm and the desirability of allowing

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[40] 343 U.S. 579 (1952).

[41] Concurring opinions of Mr. Justice Frankfurter, *id.* at 604–09; Mr. Justice Burton, *id.* at 655–60; Mr. Justice Clark, *id.* at 662–65.

[42] *See* E. Corwin, The President: Office and Powers 1787–1957, at 259 (1957): "Actually Congress has never adopted any legislation that would seriously cramp the style of a President who was attempting to break the resistance of an enemy or seeking to assure the safety of the national forces."

[43] 71 U.S. (4 Wall) 2 (1866). The case arose as a *habeas corpus* proceeding contesting the legality of a conviction by a military tribunal of a Northern civilian in Indiana during the Civil War. The Court invalidated the conviction, holding that the military tribunal had no jurisdiction, since neither the Congress nor the President could constitutionally authorize the trial of a civilian before a military tribunal in a State which had been loyal to the Union during the Civil War. *Id.* at 118–22.

[44] *Id.* at 139.

[45] Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 637. In an early case involving seizure of vessels on the high seas it was held that the President could not act inconsistently with a specific legislative prohibition. Little v. Barreme (The Flying Fish), 5 U.S. (2 Cranch) 170 (1804) involved the seizure of a ship sailing *from* a French port which was made in accordance with presidential orders interpreting the Act of 1799 (which only provided for seizure of ships bound *to* French ports). Chief Justice Marshall, for a unanimous Court, held the seizure unlawful, but noted in passing that the presidential order might well have been lawful in the absence of congressional authorization were it not for the express negation of authority contained in the Act. *See also*, the concurring opinion of Mr. Justice Clark in Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 660–61.

The Flying Fish involved an issue squarely within the specific grant of authority to Congress "to make Rules concerning Captures on Land and Water," [U.S. Const. art I, § 8] and for this reason should not be considered authority for congressional predominance in an area of shared powers, such as the war powers. Moreover, *The Flying Fish* was decided before the doctrine of "political questions" was formulated by Chief Justice Marshall in Foster v. Neilson, 27 U.S. (2 Pet). 253 (1829) and, therefore, although it has never been overruled, a similar case would probably never reach decision on the merits today.

[46] 299 U.S. 304 (1936). *See also*, Martin v. Mott, *supra*, involving an Act of Congress of 1795 which delegated authority to the President to call forth the militia in the event of an invasion or the imminent threat thereof.

him maximum flexibility in exercising that authority.[47] There are numerous other examples of wide definition of Presidential powers when acting under and in accordance with an act of Congress.[48]

III. The Modern Context

As we turn from an examination of history to an analysis of the modern context in which the President and Congress operate, I am impressed by the fundamental changes in the factual setting in which the war powers must be exercised. And indeed, it is this very change in setting which has raised difficult constitutional issues that cannot be answered by reference to history alone.

The primary factors underlying this transformation are rather evident and need only be summarized. They include, first, the emergence of the United States as a world power. Since World War II we have found it necessary to maintain a large, standing military capacity which is sufficiently well equipped and mobile to enable the United States to play a major peacekeeping role almost anywhere in the world and often with little delay. This development has generated a reliance upon the United States by other nations to help protect them—which has been translated into a series of defense treaties—and a sense of responsibility on the part of this country to fulfill our commitments in good faith.

Let me say again, because I think it is important to the issue before us, that this administration has begun to reverse the trend of expanding U.S. military involvement abroad. The Nixon doctrine means that while the United States must continue to honor its commitments and to play a large and active role in world affairs, we should not seek in all cases to have the preponderant role. We seek a new partnership with nations of the world in which they become increasingly self-reliant and assume greater responsibilities for their own welfare and security and that of the international community.[49]

The second factor which characterizes the modern context is the development of technology, especially in the field of nuclear weaponry. The fear of nuclear war and the importance of deterrence have engendered a sense of need to be able to take prompt, decisive Executive action. On the other hand, the fact that even a minor skirmish could lead to a confrontation of the major powers and raise the specter of nuclear war, serves to emphasize the desirability of appropriate congressional participation in decisions which risk involving the United States in hostilities.

Third, the institutional capacities of the Presidency have facilitated the broad use of Presidential powers. The heightened pace, complexity, and hazards of contemporary events often require rapid and clear decisions. The Nation must be able to act flexibly and, in certain cases, without prior publicity. The institutional advantages of the Presidency, which are especially important in the area of foreign affairs, were pointed out in The Federalist: The unity of office, its capacity for secrecy and dispatch, and its superior sources of information.[50]

Unlike the Presidency, the institutional characteristics of Congress have not lent themselves as well to the requirements of speed and secrecy in times of recurrent crises and rapid change. The composition of Congress, with its numerous Members and their diverse constituencies, the resultant complexity of the decision-making process, and Congress' constitutional tasks of debate, discussion, and authorization inevitably make it a more deliberative, public, and diffuse body.[51]

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[47] *Id.* at 319–22. The *Curtiss-Wright Case* is more often cited for the Court's dicta than its holding. The Court saw the foreign affairs powers as inherent attributes of national sovereignty and, consequently, vested exclusively in the federal government, to be exercised by the President as "the sole organ of the nation in its external relations." The Court suggested that this "very delicate, plenary and exclusive power of the President" with respect to foreign relations did not depend upon congressional authorization, although like every other governmental power it had to be exercised in subordination to the applicable provisions of the Constitution. *Id.* at 320. The case holding has been interpreted as withdrawing "virtually all Constitutional limitation upon the scope of Congressional delegation of power to the President to act in the area of international relations." Jones, The President, Congress and Foreign Relations, 29 Calif. L. Rev. 565, at 575 (1941). *But see* recent Supreme Court decisions which contain warnings that the *Curtiss-Wright* holding may not be followed should a similar set of facts arise in the future. Afroyim v. Rusk, 387 U.S. 253 (1967); Zemel v. Rusk, 381 U.S. 1 (1965); Reid v. Covert, 354 U.S. 1 (1957).

[48] *See* Youngstown Sheet & Tube Co. v. Sawyer, *supra* at 635 n. 2.

[49] *See, e.g.*, Richard M. Nixon, President of the United States, United States Foreign Policy for the 1970's—Building for Peace, Rep. to Cong., Feb. 25, 1971, pp. 10-21; United States Foreign Policy 1969–70, Rep. of the Secretary of State, Mar. 26, 1971, at II, 36–39.

[50] *See* The Federalist No. 64, at 485–86 (J. Hamilton ed. 1864) (J. Jay); *id.* No. 74, at 552 (A. Hamilton); *id.* No. 75, at 559 (A. Hamilton).

[51] Reveley, Presidential War Making: Constitutional Prerogative or Usurpation?, 55 Va.L.Rev. 1243, at 1271 (1969).

Yet, in order to balance this picture, we must also note the inherent limitations of the Presidency. There are few significant matters which can be accomplished by Presidential order alone. The essence of Presidential power is the ability to enlist public support for national policy,[52] and in this the President needs the cooperation of Congress. Virtually every Presidential program requires implementing legislation and funding. Through their powers of investigation and supervision, congressional committees have amply demonstrated their ability to inspire national debate, focus public opinion, and thereby influence Presidential policy. The Senate's power to advise and consent to treaties and appointments serves as a constant reminder of the Senate's indispensable role in foreign policy.

Of course, the electorate is the ultimate restraint upon the President and Congress in the exercise of the war powers. As President Nixon said in his "State of the World" message: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain." [53] The President and Congress must be sensitive to the people's willingness to suffer the potential physical, economic, and political costs of military actions. The Nation's ability to sustain long-term military action depends on the ability of the President and Congress to convince the people of the wisdom of their policies.

IV. The Proper Balance Between Congress and the President

Thus far I have discussed what has happened to the war powers over the course of our history and described the modern context in which those powers must be exercised. The most difficult question is still before us. What should we seek for the future—what is the proper balance between the Congress and the President?

It seems to me that we must start from the recognition that the exercise of the war powers under the Constitution is essentially a political process. It requires cooperation and mutual trust between the President and Congress and wise judgment on the part of both if the Nation's interests are to be well served.

Your committee now has before it several bills [54] which attempt to define and codify the war powers of the President and Congress in a way that I believe would not serve the Nation's long-term interests. I believe that the objectives of the sponsors of these bills, including Senator Javits, Senator Taft, and Senator Eagleton, and most recently Senator Stennis, are the same as the objectives of this administration. We both want to avoid involving the Nation in wars; but if hostilities are forced upon us, we want to make certain that U.S. involvement is quickly and effectively undertaken and is fully in accordance with our constitutional processes. So the difference is not in our objectives but in how to achieve those objectives.

I am opposed to the legislation before you as a way to achieve these objectives because (1) it attempts to fix in detail, and to freeze, the allocation of the war power between the President and Congress—a step which the framers in their wisdom quite deliberately decided against, and (2) it attempts in a number of respects to narrow the power given the President by the Constitution.

Regarding the first point, these bills reflect an approach which is not consistent with our constitutional tradition. The framers of the Constitution invested the executive and legislative branches with war powers appropriate to their respective roles and capabilities, without attempting to specify precisely who would do what in what circumstances and in what time period, or how far one branch could go without the other. This was left to the political process, which is characteristic of the constitutional system of separation of powers. Our constitutional system is founded on an assumption of cooperation rather than conflict, and this is vitally necessary in matters of war and peace. The effective operation of that system requires that both branches work together from a common perspective rather than seeking to forge shackles based on the assumption of divergent perspectives.

As for the second aspect, although the bills recognize to a significant extent the President's full range of constitutional authority, they do tend to limit the Presi-

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[52] *See* R. Neustadt, Presidential Power: The Politics of Leadership (1960): "The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his "powers" he does not obtain results by giving orders—or not, at any rate, merely by giving orders. He also has extraordinary status, *ex officio*, according to the customs of our government and politics. Here is testimony that despite his status he does not get action without argument. Presidential power is the power to persuade." *Id.* at 23.

[53] Richard M. Nixon, Rep. to Cong., Feb. 25, 1971, *supra* at 16.

[54] *See e.g.*, S.J. Res. 18, 92d Cong., 1st Sess. (introduced by Sen. Taft Jan. 27, 1971); S. 731, 92d Cong., 1st Sess. (introduced by Sen. Javits Feb. 10, 1971); S.J. Res. 59, 92d Cong., 1st Sess. (introduced by Sen Eagleton Mar. 1, 1971); S.J. Res. 95, 92d Cong., 1st Sess. (introduced by Sen. Stennis May 11, 1971).

dent in some questionable ways. It appears, for example, that two of the bills[55] do not cover situations like that of the Cuban missile crisis. In failing to recognize the need for immediate action and the propriety of a Presidential response to such situations, the bills are unduly restrictive. It is inconceivable, for example, that the President could have carried out the delicate diplomatic negotiations with the Soviets which led to the removal of the missiles from Cuba if there had been a full-scale congressional debate prior to his deciding on a course of military and diplomatic action.

Some of the bills would also seek to restrict the President's authority to deploy forces abroad short of hostilities. This raises a serious constitutional issue of interference with the President's authority under the Constitution as Commander in Chief. Moreover, requiring prior congressional authorization for deployment of forces can deprive the President of a valuable instrument of diplomacy which is used most often to calm a crisis rather than enflame it. For example, such a restriction could seriously limit the ability of the President to make a demonstration of force to back up the exercise of our rights and responsibilities in Berlin or to deploy elements of the 6th Fleet in the Mediterranean in connection with the Middle East situation.

At least two of the bills would require that action initiated by the President within his specified authority be terminated after 30 days unless Congress enacts sustaining legislation;[56] and three of the bills would permit Congress to terminate presidential action in less than 30 days.[57] The bills would provide for expedited action on such legislation but would not and could not insure definitive congressional action within the 30-day period. This raises another constitutional issue, that is whether the President's authority under the Constitution—for example, to protect the Nation against sudden attack—could be limited or terminated by congressional action or inaction. The 30-day limitation also raises practical problems regarding the conduct of our forces. Once our forces are committed to hostilities, it might prove impossible to terminate those hostilities and provide for the safety of our forces within an arbitrary time period. To the extent the legislation would impinge in these ways upon the President's authority as Commander in Chief and Chief Executive, it is of doubtful constitutionality.

There is another consideration. To circumscribe presidential ability to act in emergency situations—or even to appear to weaken it—would run the grave risk of miscalculation by a potential enemy regarding the ability of the United States to act in a crisis. This might embolden such a nation to provoke crises or take other actions which undermine international peace and security.

I do not believe we have sufficient foresight to provide wisely for all contingencies that may arise in the future. I am sure the Founding Fathers acted on that premise; and we should be most reluctant to reverse judgment. Moreover, I firmly believe that Congress' ability to exercise its constitutional powers does not depend on restricting in advance the necessary flexibility which the Constitution has given the President.

At the same time, I want to make clear that I do not interpret "flexibility" as a euphemism for unchecked executive power. Some have argued that Congress' power to declare war should be interpreted as a purely symbolic act with little real substance in a world in which declared wars have become infrequent despite the existence of real hostilities.[58] In my judgment it would be improper to do so. Congress' power to declare war retains real meaning in the modern context. While the form in which the power is exercised may change, nevertheless the constitutional imperative remains: if the Nation is to be taken into war or to embark on actions which run serious risk of war, the critical decisions must be made only

[55] S. 731, *supra*, would only authorize the President to use the armed forces, in the absence of a declaration of war, in four specific situations: (1) to repel a sudden attack against the U.S., its territories, and possessions; (2) to repel an attack against U.S. armed forces on the high seas or lawfully stationed abroad; (3) to protect the lives and property of U.S. nationals abroad; and (4) to comply with a "national commitment" as defined in S. Res. 85, 91st Cong., 1st Sess. (1969). S.J. Res. 59, *supra*, would limit unauthorized presidential military action to (1) repelling an attack on the U.S.; (2) repelling an attack on U.S. armed forces; and (3) withdrawing U.S. citizens from countries where their lives are subjected to an imminent threat.

[56] S. 731 and S.J. Res. 95, *supra*.

[57] S. 731, S.J. Res. 59 and S.J. Res. 95, *supra*.

[58] Formal declarations of war are often deliberately avoided because they tend to indicate both at home and abroad a commitment to total victory and may impede settlement possibilities. The issuance of a formal declaration also has certain legal results: treaties are suspended, trading, contracts and debts with the enemy are suspended; vast emergency powers become operative domestically; and the legal relations between neutral states and belligerents are altered. *See* Eagleton, The Form and Function of the Declaration of War, 33 Am. J. Int'l L. 19-20, 32-35 (1938). On the other hand, Professor Moore argues that: "probably the most compelling reason for not using a formal declaration . . . is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out '[T]here has not been a formal declaration of war—anywhere in the world—since World War II.' " Moore, The National Executive and the Use of the Armed Forces Aborad, 21 Nav. War. Col. Rev. 28, at 33 (1969). *See generally*, J. Maurice, Hostilities Without Declaration of War (1883).

after the most searching examination and on the basis of a national consensus and they must be truly representative of the will of the people. For this reason, we must insure that such decisions reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities.

V. Conclusion

What needs to be done to insure that the constitutional framework of shared responsibility for the exercise of the war powers works in the Nation's best interests?

First, we are prepared to explore with you ways of helping Congress reinforce its own information capability on issues involving war and peace. For example, I would be prepared to instruct each of our geographic assistant secretaries to provide your committee on a regular basis with a full briefing on developments in his respective area, if you believed this would be helpful. Regular and continuing briefings would enable the committee to keep abreast of developing crisis situations. This would be in addition to the numerous official and informal contacts which regularly take place between members of the two branches.

Second, there needs to be effective consultation between Congress and the President, and we have tried to follow this policy. It is not only Congress that is weakened by a lack of consultation. Our Nation's foreign policy is itself weakened when it does not reflect continuing interaction and consultation between the two branches.

Third, the Congress must effectively exercise the powers which it has under the Constitution in the war powers area. In its 1969 report on the national commitments resolution, your committee recognized that "no constitutional amendment or legislative enactment is required" for Congress to assert its constitutional authority. "If Congress makes clear that it intends to exercise these powers," the report states in referring to Congress war powers, "it is most unlikely that the Executive will fail to respect that intention." [59] I agree with that conclusion.

Fourth, there is the need to act speedily, and sometimes without prior publicity, in crisis situations. We should try to find better institutional methods to keep these requirements from becoming an obstacle to Congress exercising its full and proper role. Suggestions have come from a number of quarters for the establishment of a joint congressional committee which could act as a consultative body with the President in times of emergencies. If, after study, you believe this idea has merit, we would be prepared to discuss it with the committee and determine how best we could cooperate.

Fifth, there is, in my view, the clear need to preserve the President's ability to act in emergencies in accordance with his constitutional responsibilities. This ability to act in emergencies, by its very nature, cannot be defined precisely in advance. Let me emphasize that I am not suggesting a Presidential carte blanche. As I indicated at the beginning of my statement, I believe the framers of the Constitution intended decisions regarding the initiation of hostilities to be made jointly by the Congress and the President, except in emergency situations. I believe that constitutional design remains valid today.

In conclusion, I would like to refer to the suggestion which the distinguished Senator from Mississippi, Senator Stennis, made last Tuesday that the war powers question requires thorough consideration and full study. He said, "I think this matter should be pending for a year or more. It must be understood in every facet and the people must understand fully the question that is involved." [60] I believe that is wise advice. This is a basic question affecting our constitutional structure and the security of our Nation. It is most important that such a matter be considered deliberately and calmly, in an atmosphre free from the emotion and the passions that have been generated by the Vietnam conflict.

We in the executive branch are prepared to continue the discussion of the war powers question with you. Our sole objective is to insure that the Nation's interests are best served in this vital area.

My own view is that the constitutional framework of shared war powers is wise and serves the interests of the Nation well in the modern world. The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decisionmaking could not be clearer than it is today. What is required is the judicious and constructive exercise by each branch of its constitutional powers rather than seeking to draw arbitrary lines between them.

[59] Docs. on the War Power 1970, *supra* at 32.
[60] 117 Cong. Rec. at S6616 (daily ed. S. Jour. May 11, 1971).

Statement by Leon Friedman, Special Counsel, American Civil Liberties Union

On behalf of the American Civil Liberties Union, I appreciate the opportunity to communicate our views to the members of this subcommittee on the pending bills and resolutions relating to the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

The American Civil Liberties Union believes that the circumstances surrounding the decision to begin and to continue American participation in the war in Vietnam document clearly the need for congressional reassertion of its traditional powers and responsibilities in this area. Most of the resolutions pending before this committee have the beneficial effect of requiring explicit congressional approval before the President may start and continue hostilities. All recognize the right of our military forces to defend themselves from attack and to protect American citizens abroad.

Of the proposals before this committee, the ACLU has concluded that House Joint Resolution 431 affords the best protection against unilateral exercise of the war power by the President. We, therefore, urge that it be reported favorably by this committee.

Our reasons for preferring House Joint Resolution 431 are as follows:

1. *It makes clear that existing treaties do not by their own authority permit the President to initiate hostilities in defense of treaty signatories.*

The SEATO treaty has often been cited as the authority for our involvement in Vietnam, but by its own terms it requires that a treaty member must act "in accordance with its constitutional processes." This language is contained in most of our existing defense treaties. It can only mean that the Congress must explicitly authorize military action before hostilities can legally commence.

2. *It also makes clear that appropriations acts are not to be considered an exercise of the war power.* Specific, separate authorizing language is necessary. We think this is an important point since the courts have interpreted defense spending bills as authorizing military action.

3. *It also defines "hostilities" very specifically to include the deployment of American troops only under circumstances where an imminent involvement in combat activities with other armed forces is of a reasonable possibility.* Some such definition is desirable since otherwise the President may deploy troops or send military advisers abroad to places where they are sure to be fired upon. At that point the President should not be permitted to start a full scale war on the claim that he is defending American troops in the field.

4. *House Joint Resolution 431 contains very specific limiting language on what constitutes "defensive action."* In this day when both sides call the other an aggressor, it is desirable to try to define what is or is not "defense."

5. *It also limits the President's ability to use military force to defend American property abroad.*

Inadequacies of House Joint Resolution 1

The reasons set forth above which have caused us to endorse House Joint Resolution 431 have also led us reluctantly to the conclusion that House Joint Resolution 1, sponsored by the chairman of this subcommittee, which requires only that the President report to the Congress on the military steps he has taken, is an inadequate check on presidential usurpation of the war power. For that reason we do not think that House Joint Resolution 1 meets the constitutional problem which urgently demands resolution.

Both President Johnson and President Nixon have insisted that they sought appropriate consultation with the Congress during the Vietnam hostilities. Furthermore, both Presidents have cited the constitutional, legislative, and treaty provisions which they claimed granted them authority for what they did. President Johnson cited the SEATO treaty as support for his actions and President Nixon relies solely on his powers as Commander in Chief. In short, if House Joint Resolution 1 had been in force in 1964, the President could have taken the same actions as were taken over the past 7 years with no thought of seeking further authority from Congress.

But the Vietnam war has shown that the President has assumed too much military power and has gone far beyond the constitutional limits established in 1787 and followed into the 1950's. The way for Congress to redress the balance is to require that Congress act *before* the President's authority to commit troops is complete.

We must emphasize again that House Joint Resolution 431 and other resolutions before this subcommittee recognize the right of the President to meet emergency situations. But the danger revealed by Vietnam which must be faced is the possibility that the President will commit this Nation to sustained hostilities in a nonemergency situation without explicit authorization from Congress. Any resolution that does not meet that problem is inadequate.

Summary of supporting reasons

In support of our endorsement of House Joint Resolution 431, we would like to cover three areas:

First, we would like to comment on the civil liberties aspect of this problem, an area which we believe has thus far been overlooked. There can be no doubt that, in time of war, great restrictions are placed upon the freedoms of the people and their exercise of first amendment rights. Under those circumstances the decision to go to war must be made by as broad a consensus as possible. It should not be left to the President alone.

Secondly, we will discuss briefly the constitutional restrictions on executive exercise of the war power. It is our position that not only do the constitutional text and the debates make clear that the President cannot wage war on his own authority, but that our entire military history supports the notion that Congress must be the body to decide whether we begin a war—a position recognized by Congress, the President and courts alike since the beginning of our history.

Thirdly, we would like to bring to the attention of the subcommittee recent judicial decisions in cases initiated by the American Civil Liberties Union which, we believe, give some urgency to the need for legislation to define the way the Congress will exercise its military powers under the Constitution. A Federal Court of Appeals in New York has within the past few weeks held that any congressional support or recognition of a presidentially-initiated war, whether through appropriations or extension of the draft law, amounts to an exercise of the war power. *Orlando* v. *Laird*, Nos. 477 and 478 (Apr. 20, 1971). This decision makes absolutely necessary a more precise delineation of responsibility between the President and Congress with respect to the war powers. We have attached a copy of the *Orlando* decision as appendix A to this statement.

A. Civil liberties problems

The importance of prior congressional authorization of any military activity is not an abstract constitutional problem. The smallest military adventure may lead to an unforeseen confrontation between the superpowers. An unanticipated excursion into enemy territory by an erring plane, an overeager response by a radar station and atomic missiles may be launched.

Even if the danger of an atomic holocaust could be kept to a minimum any major military action by the government immediately produces severe curtailments of civil liberties. Men must be drafted for the Army. Any criticism of the administration for its war policy may be punished by the government as giving aid and comfort to the enemy. A spirit of national fear and hysteria may bring about even more restrictions on personal rights.

In the face of this erosion of personal rights in time of war, the decision to go to war must be made by as broad a consensus as possible. It is unthinkable that the President alone can start the Nation on this deadly and dangerous path with out the consent of the people's legislative representatives. The people will not only bear the financial weight of the war through increased taxes, but sons and husbands will have to fight in the war. The civil liberties of all will be seriously curtailed. Their approval expressed through Congress, is absolutely necessary before war can begin.

We have only to look at the wars in this century to see how war affects personal rights. During World War I many groups in this country opposed our participation in the war and the conscription of the Nation's youth to fight in Europe. Innocent meetings called to protest the draft law were broken up by police and vigilante groups, the participants beaten, arrested and often sentenced to long jail terms. Socialist literature suggesting the illegality of conscription was seized by the police and denied mailing privileges by the Post Office Department. Statements of opposition to the war led to indictment under the Espionage Act as encouragement to draft evaders.

During World War II there was also a breakdown in the protection of personal rights guaranteed by the Constitution. More than 100,000 American citizens of Japanese extraction were moved from their homes on the west coast and sent to detention centers for the course of the war. Merely because of their racial background, these citizens were forced to live in concentration camps for years. These actions resulted from wartime hysteria and the unthinking fears and hatreds produced by the pressures of World War II.

In addition, the Army took over the administration of Hawaii, declared martial law, and ruled it as if it were a military base for most of the war. The civil courts were closed and Army court-martials tried civilians for any and all criminal offenses. The Supreme Court did not declare this procedure unconstitutional until the war was over (*Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946)).

The Korean war exacerbated the great civil liberties crisis of McCarthyism. Unsubstantiated charges of communist-affiliation led to loss of government jobs for hundreds of professional men and women who had spent years in their positions. For the same reason, teachers were fired from their posts. Writers, scientists and artists found themselves on employer blacklists so that they could not be gainfully employed. Military personnel were given less than honorable discharges from the Army because of alleged communist activities by their parents or relatives. Numerous restrictions on personal rights were enacted into law in the McCarran Act, the Subversive Activities Control Act and many others.

The Vietnam war has also led to a serious curtailment of the people's civil liberties. The military involvement of this country in a war opposed by a large part of our society has had a highly detrimental effect on the enjoyment of these personal rights.

The present draft system, with its severe deprivation of personal liberty and its administrative inequities, still continues. The right of nonobstructive dissent by service personnel and civilians who oppose the war has been curbed, often by harsh measures. Because of their antiwar activities a group of East Coast intellectuals including Dr. Benjamin Spock, were indicted for conspiring to counsel young men to refuse service in the Army—a sad throwback to the World War I indictments under the Espionage Act. Dissident groups in this society who vigorously fight against the war and other social evils find themselves indicted for conspiracy to cross State lines to incite a riot or are subpenaed to appear before Federal grand juries to tell of their involvement in antiwar activities. The threat of criminal prosecution hangs over the heads of young men and women for various forms of peaceful expression and symbolic speech, such as flag offenses and draft card burning. Freedom of the press has been undermined by subtle and not so subtle threats by high government officials who do not like the growing antiwar criticism in the newspapers and television networks. Wiretaps, electronic surveillance, and police spies, techniques employed widely to gather information on antiwar activists, all intrude upon the people's right to privacy.

Many of these actions have been taken to blunt the impact of the antiwar movement, as the Government attempts to create an illusion of national unity while it wages an unwanted war in Vietnam. Worse still the basic values of this society are torn apart and the legitimacy of its institutions seriously questioned because the war continues over the opposition of growing numbers of Americans. As Senator Sam Ervin said on the floor of Congress:

"The consequences of this failure to observe the Constitution are all too evident. True no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandanavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence in our university campuses. ROTC programs are being forced out of schools, and there is dissension and antiwar activity even among those in uniform.

"Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam" (115 *Cong. Rec.* 17217 (June 25, 1969).)

The best way to mitigate against the problems outlined by Senator Ervin is to make sure that the people's approval of war is secured through their Representatives in Congress, to insure that a national consensus exists to launch any military action.

B. Constitutional limitations on presidential war power

We think it important to note at the outset of this part of our statement that the limitations on the presidential warmaking power outlined in the bills and resolutions before this committee are already contained in the Constitution. Nevertheless, we believe it highly desirable to articulate them more fully by legislation.

Professors Commager, Kelly, and Mason have already testified about the historical purpose of the war powers clause and why the power was universally considered legislative in nature. The debates at the Constitutional Convention leave little doubt that the President was not to be allowed to start war on his own. Over 100 years ago, Justice Joseph Story, the great Supreme Court justice and legal scholar, made the following comments about the war power in his "Commentaries on the Constitution":

"* * * the power of declaring war is only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the Nation * * *. The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its time, and the ways and means of making it effective. The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others "(sec. 1171 (5th edition, 1891), p. 92).

The meaning of the war power clause, and its specific application to concrete situations, has been faced numerous times in our history. It has become recognized that the Executive has the power to initiate certain limited forms of military activities, along with the more general power to repel direct attacks on the United States. Included in the limited emergency instances are numerous cases where the President used military force to protect American citizens or property located in foreign countries, or to commit reprisals against politically unorganized bandits or pirates.

Beyond these very limited powers, it has been recognized, declared and accepted by President, Congress, and Court alike that the Executive has no power to initiate or prosecute hostilities without having been first authorized to do so by Congress. Set out in appendix B to this testimony are the statements of Presidents Jefferson, Madison, Jackson, Polk, Buchanan, Lincoln, Grant, Arthur, Taft, Roosevelt, and Eisenhower, all of which confirm the recent National Commitments Report of this committee to the effect that—

"* * * the founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the Executive. Far from altering the intent of the framers, as is sometimes alleged, the practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances. The only uses of military power that can be said to have legitimately accrued to the Executive in the course of the Nation's history have been for certain specific purposes such as suppressing piracy and the slave trade, 'not pursuit' of fugitives, and, as we have noted, response to sudden attack. Only in the present century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1950 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare "(S.R. 91-129 to accompany S. Res. 85, 91st Cong. 1st sess., Apr. 16, 1969, p. 31).

The power of Congress to declare war has also followed the pattern described above. As it has evolved, the power has not been restricted to an inflexible and mechanistic requirement that the talismanic words "We declare war" be uttered but rather a flexible instrument to be used by Congress to give precise authorization to the President to set guidelines as to the purpose and scope of military hostilities to be conducted by the President.

Congress has declared war five times: to begin the War of 1812 (2 Stat. 755), the Mexican War of 1846 (9 Stat. 9), the Spanish American War of 1898 (30 Stat. 738), World War I (40 Stat. 1) and World War II (55 Stat. 795). It also gave the President unlimited powers to meet the emergencies of the Civil War (12 Stat. 326).

In numerous other cases Congress has authorized the Executive to involve the Nation in military hostilities of a secondary nature, involving a less than maximum commitment of the Nation's military resources. *Even in these secondary military*

commitments, falling far below the level of commitment reached in the Vietnamese conflict, explicit congressional approval was sought and forthcoming.

For example, the naval war with France, waged from 1798–1801, was authorized by explicit congressional resolution, 1 Stat. 561; 1 Stat. 572, extended 2 Stat. 39 (Apr. 22, 1800); 1 Stat. 574; 1 Stat. 578; 1 Stat. 743; see discussion in *Bas* v. *Tingey*, 4 Dall. 37 (1800); *Talbot* v. *Seeman*, 1 Cranch 1 (1801). The naval war against Tripoli (1802) was authorized by explicit congressional resolution, 2 Stat. 129. The naval war against Algiers (1815) was authorized by explicit congressional resolution. 3 Stat. 230 (Mar. 3, 1915).

In 1839 Congress specifically authorized the President "to resist any attempt on the part of Great Britian to enforce, by arms, her claim to exclusive jurisdiction over that part of Maine, which is in dispute * * * and for that purpose to employ the naval and military force of the United States, 5 Stat. 355. By joint resolution of June 2, 1858, President James Buchanan was authorized by Congress to use such force as "may be necessary and advisable" to settle differences with Paraguay, 11 Stat. 370. The President was also empowered to initiate hostilities against Venezuela in 1890 after three American steamships had been seized, 26 Stat. 674. Following the capture of eight American sailors by the Mexican Army in 1914, Congress permitted President Wilson to employ the "armed forces to enforce his demands for unequivocal amends for affronts and indignities committed against the United States," 38 Stat. 770.

All of these declarations, laws, and resolutions show Congress, acting under its constitutional powers, working swiftly in collaboration with the Executive to meet threats or difficulties abroad. None of the supposed problems concerning legislative cooperation with the Executive occurred—there were no endless deliberations or weakening vacillations or compromises, nor were there two governmental voices speaking to the world on behalf of the United States. The constitutional collaboration planned by the framers worked as they foresaw.

C. Recent judicial decisions on the war power

This view of the scope of the Executive's war power is confirmed by a series of recent decisions on the Vietnam war. The Second Circuit Court of Appeals wrote in *Berk* v. *Laird*, 429 F. 2d 302, 305 (2d Cir. 1970):

"If the executive branch engaged the Nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with article I, section 8."

Federal District Judge John Dooling wrote in *Orlando* v. *Laird*, —— F. Supp. —— (E.D.N.Y. 1970):

"Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the Presidency. In no real sense was there even an exception for emergency action and certainly not for a self-defined emergency power in the Presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the Presidency that the convention was forming, are clear in the view that (as Wilson put it) the power to make war and peace are legislative."

However, despite the clear authority for the proposition that Congress must act to authorize a war, the courts have nevertheless upheld the legality of the Vietnam war. They have done so for reasons that should be of particular concern for this committee as it formulates its war powers resolution.

The most authoritative decision on the scope of the Presidential war powers was decided last month, on April 20, 1971, by the Second Circuit Court of Appeals in New York in the case of *Orlando* v. *Laird* (app. A). It held that Congress has exercised its war powers in Vietnam and has thus authorized the war, by the Gulf of Tonkin resolution, by the military appropriations bills passed for Vietnam, and by extension of the draft law:

"The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf resolution * * * was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future 'to prevent further aggression.' Congress has ratified the Executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill 'the substantial induction calls necessitated by the current Vietnam buildup.'"

The court concluded:

"There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other * * *. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia."

In short, the court has said that instead of a declaration of war or an explicit authorizing resolution, the mere fact that there is "continuing mutual participation in the prosecution of the war" by Congress and the President is sufficient to satisfy the Constitution.

We think that this decision is wrong and it will be appealed to the U.S. Supreme Court. It is wrong because the court of appeals totally ignored the repeal of the Gulf of Tonkin resolution and because the court misconstrued the legal effect and legislative history of the military appropriations bills which were never meant to ratify what the President was doing in Vietnam. However, until the Supreme Court reverses, the *Orlando* decision appears to be the most authoritative decision on this problem.

What the decision means as a practical matter is that Congress cannot wash its hands of its responsibilities under the war power clauses of the Constitution. It cannot say, this is a matter for the Executive to decide. As soon as any hostilities have begun by the President, there will come a time when congressional participation will become necessary. Most obviously this will happen when funds are requested for the Defense Department, when a conscription act is passed, or when a provision is made for veterans' rights or when foreign aid of the ally we are helping is provided by Congress. Once Congress gets into the picture, by taking any steps in furtherance of the presidentially initiated war, or in recognition of it, the logic of the *Orlando* case would indicate that those steps are an exercise of the war power and that the war thereby becomes legal. In other words Congress cannot sit idly by when a war begins. Its responsibility is thrust upon it by the Constitution and it must assert its power explicitly or it will find that it has exercised that power without ever making a conscious choice to do so.

The *Orlando* case would require that Congress must stop a war once the President has initiated it. But whatever the powers of Congress might be, the framers did not intend that Congress would have to take the positive step of exercising them in order to stop a Presidential war. They explicitly committed the initial war power to Congress, requiring the concurrence of a majority of legislators in both Houses before war could begin. Any rule which undermines that power or subjects it to extraneous pressures, whether practical or political, runs directly counter to the wishes of the Constitution's framers.

The best way of stopping a war is to deny funds for the Military Establishment. But is this a realistic alternative? How many Congressmen or Senators can vote to deprive American soldiers in the field of the necessary guns and supplies that they need to defend themselves? The practical pressures on Congress to "support our boys" in the field may become irresistible after the war has been raging for some period of time. Imposing such a burden on the legislature would in effect facilitate the commencement of a Presidential war, directly contrary to the expressed wishes of the founders.

Indeed, imposing such a requirement on Congress makes it far easier for the President to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote for their continued support. The legislature might be willing to cut off funds for a small expeditionary force, knowing that the President can easily extricate them. But it would find it impossible to do so when hundreds of thousands of troops are committed to battle.

In addition, the President may insist that any restriction on funds hampers his negotiating capacity and that he should be given a free hand to terminate the war in accordance with military requirements. Obviously the Congress would be reluctant to intervene in the face of such assertions.

In short, once a war is begun by the President, the need to protect the men in the field combined with the judicial reasoning shown in the *Orlando* case effectively denies the Congress any power to restrict the warmaking ability of the President until the war winds down of its own accord.

Conclusion

All of the above points to the inescapable conclusion that House Joint Resolution 431, or one of the other pending bills or resolutions, is of crucial constitutional

importance. They require that Congress' participation must be established initially through an express authorization, rather than being inferred by ambiguous appropriations bills passed after the war has begun. Without clear, explicit legislation, a Presidential-initiated war will be illegal. They thus would make express what we believe is constitutionally required—that the Congress ratify any Presidential proposal to go to war at the outset.

The Vietnam adventure has taught us that the dangers of war are too serious to be left to the President and his immediate staff. There are reasons why the framers of the Constitution insisted that the broadest consensus must be established before we go to war. We have tried to show that those reasons are still with us. The most horrible result of the Vietnam war may not be the terrible toll in lives and the devastation and destruction in that country. It would be even more horrible if we do not now take corrective action to insure that it will not occur again. We urge this committee to take the steps necessary to prevent that from happening.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 477 and 478—September Term, 1970

(Argued March 3, 1971 Decided April 20, 1971)

Docket Nos. 35270 and 35535

SALVATORE ORLANDO, *Plaintiff-Appellant*,

v.

MELVIN LAIRD, individually and as Secretary of Defense of the United States; and STANLEY R. RESOR, individually and as Secretary of the Army of the United States, *Defendants-Appellees*.

MALCOLM A. BERK, *Plaintiff-Appellant*,

v.

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESOR, individually, and as Secretary of the Army of the United States, and Col. T. F. SPENCER, individually, and as Chief of Staff, United States Army Engineers Center, Fort Belvoir, *Defendants-Appellees*.

Before:

LUMBARD, *Chief Judge*
KAUFMAN and ANDERSON, *Circuit Judges*

Appeal by plaintiff Berk from summary judgment in favor of the defendants and dismissal of his action in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, and appeal by palintiff Orlando from denial of his petition for a preliminary injunction in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, in actions in which both plaintiffs challenged the constitutional sufficiency of the authority of the executive branch to wage war in Vietnam. Affirmed.

LEON FRIEDMAN, Esq., New York Civil Liberties Union, N. Y., N. Y. (Burt Neuborne, Esq., Kunstler, Kunstler & Hyman, Norman Dorsen, Esq., and Kay Ellen Hayes, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellant Orlando*.

NORMAN DORSEN, Esq., N. Y. U. School of Law, N. Y., N. Y. (Leon Friedman, Esq., Burt Neuborne, Esq., New York Civil Liberties Union, Theodore C. Sorensen, Esq., Kay Ellen Hayes, Esq., and March Luxemberg, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellant Berk*.

EDWARD R. NEAHER, United States Attorney, Eastern District of New York (Robert A. Morse, Chief Assistant U.S. Att'y, David G. Trager, Esq., Edward R. Korman, Esq., and James D. Porter, Jr., Esq., Assistant U. S. Attorneys, Eastern District of New York, on the brief), *for Defendants-Appellees*.

ANDERSON, *Circuit Judge:*

Shortly after receiving orders to report for transfer to Vietnam, Pfc. Malcolm A Berk and Sp. E5 Salvatore Orlando, enlistees in the United States Army, commenced separate actions in June, 1970, seeking to enjoin the Secretary of Defense, the Secretary of the Army and the commanding officers, who signed their deployment orders, from enforcing them. The plaintiffs-appellants contended that these executive officers exceeded their constitutional authority by ordering them to participate in a war not properly authorized by Congress.

In Orlando's case the district court held in abeyance his motion for a preliminary injunction pending disposition in this court of Berk's expedited appeal from a denial of the same preliminary relief. On June 19, 1970, we affirmed the denial of a preliminary injunction in *Berk* v. *Laird*, 429 F.2d 302 (2 Cir. 1970), but held that Berk's claim that orders to fight must be authorized by joint executive-legislative action was justiciable. The case was remanded for a hearing on his application for a permanent injunction. We held that the war declaring power of Congress, enumerated in Article I, section 8, of the Constitution, contains a "discoverable standard calling for *some* mutual participation by Congress," and directed that Berk be given an opportunity "to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity," and thereby escape application of the political question doctrine to his claim that congressional participation has been in this instance, insufficient.

After a hearing on June 23, 1970, Judge Dooling in the district court denied Orlando's motion for a preliminary injunction on the ground that his deployment orders were constitutionally authorized, because Congress, by "appropriating the nation's treasure and conscripting its manpower," had "furnished forth the sinew of war" and because "the reality of the collaborative action of the executive and the legislature required by the Constitution has been present from the earliest stages." *Orlando* v. *Laird*, —— F. Supp. ——, —— (E.D.N.Y. 1970).

On remand of Berk's action, Judge Judd of the district court granted the appellees' motion for summary judgment. Finding that there had been joint action by the President and Congress, he ruled that the method of congressional collaboration was a political question. *Berk* v. *Laird*, —— F. Supp. ——, —— (E.D.N.Y. 1970).

The appellants contend that the respective rulings of the district court that congressional authorization could be expressed through appropriations and other supporting legislation misconstrue the war declaring clause, and alternatively, that congressional enactments relating to Vietnam were incorrectly interpreted.

It is the appellants' position that the sufficiency of congressional authorization is a matter within judicial competence because that question can be resolved by "judicially discoverable and manageable standards" dictated by the congressional power "to declare War." See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969). They interpret the constitutional provision to require an express and explicit congressional authorization of the Vietnam hostilities though not necessarily in the words, "We declare that the United States of America is at war with North Vietnam." In support of this construction they point out that the original intent of the clause was to place responsibility for the initiation of war upon the body most responsive to popular will and argue that historical developments have not altered the need for significant congressional participation in such commitments of national resources. They further assert that, without a requirement of express and explicit congressional authorization, developments committing the nation to war, as a *fait accompli*, became the inevitable adjuncts of presidential direction of foreign policy, and, because military appropriations and other war-implementing enactments lack an explicit authorization of particular hostilities, they cannot, as a matter of law, be considered sufficient.

Alternatively, appellants would have this court find that, because the President requested accelerating defense appropriations and extensions of the conscription laws after the war was well under way, Congress was, in effect, placed in a strait jacket and could not freely decide whether or not to enact this legislation, but rather was compelled to do so. For this reason appellants claim that such enactments cannot, as a factual matter, be considered sufficient congressional approval or ratification.

The Government on the other hand takes the position that the suits concern a non-justiciable political question; that the military action in South Vietnam was

authorized by Congress in the "Joint Resolution to Promote the Maintenance of Internal Peace and Security in Southeast Asia" [1] (the Tonkin Gulf Resolution) considered in connection with the Seato Treaty; and that the military action was authorized and ratified by congressional appropriations expressly designated for use in support of the military operations in Vietnam.

We held in the first *Berk* opinion that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine. *Baker* v. *Carr, supra; Powell* v. *McCormack, supra.* As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question. The evidentiary materials produced at the hearings in the district court clearly disclose that this test is satisfied.

The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf Resolution, enacted August 10, 1964 (repealed December 31, 1970) was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression." Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia [2] and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup." [3]

There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other.

Although appellants do not contend that Congress can exercise its war-declaring power only through a formal declaration, they argue that congressional authorization cannot, as a matter of law, be inferred from military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President. Putting aside for a moment the explicit authorization of the Tonkin Gulf Resolution, we disagree with appellants' interpretation of the declaration clause for neither the language nor the purpose underlying that provision prohibits an inference of the fact of authori-

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[1] The two district judges differed over the significance of the Tonkin Gulf Resolution, Pub. Law 88-408, 78 Stat. 384, August 10, 1964, in the context of the entire course of the congressional action which related to Vietnam. Judge Judd relied in part on the Resolution as supplying the requisite congressional authorization; Judge Dooling found that its importance lay in its practical effect on the presidential initiative rather than its constitutional meaning.

Although the Senate repealed the Resolution on June 24, 1970, it remained in effect at the time appellants' deployment orders issued. Cong. Record S. 9670 (June 24, 1970). The repeal was based on the proposition that the Resolution was no longer necessary and amounted to no more than a gesture on the part of the Congress at the time the executive had taken substantial steps to unwind the conflict, when the principal issue was the speed of deceleration and termination of the war.

[2] In response to the demands of the military operations the executive during the 1960s ordered more and more men and material into the war zone; and congressional appropriations have been commensurate with each new level of fighting. Until 1965, defense appropriations had not earmarked funds for Vietnam. In May of that year President Johnson asked Congress for an emergency supplemental appropriation "to provide our forces [then numbering 35,000] with the best and most modern supplies and equipment." 111 Cong. Rec. 9283 (May 4, 1965). Congress appropriated $700 million for use "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia." Pub. L. 89-18, 79 Stat. 109 (1965). Appropriation acts in each subsequent year explicitly authorized expenditures for men and material sent to Vietnam. The 1967 appropriations act, for example, declared Congress' "firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam" and supported "the efforts being made by the President of the United States . . . to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement. . . ." Pub. L. 90-5, 81 Stat. 5 (1967).

The district court opinion in *Berk* v. *Laird.* — F. Supp. — (E.D.N.Y. 1970), sets out relevant portions of each of these military appropriations acts and discusses their legislative history.

[3] In H. Rep. No. 267, 90th Cong., 1st Sess. 38 (1967), in addition to extending the conscription mechanism, Congress continued a suspension of the permanent ceiling on the active duty strength of the Armed Forces, fixed at 2 million men, and replaced it with a secondary ceiling of 5 million. The House Report recommending extension of the draft concluded that the permanent manpower limitations "are much lower than the currently required strength." The Report referred to President Johnson's selective service message which said, ". . . that without the draft we cannot realistically expect to meet our present commitments or the requirements we can now foresee and that volunteers alone could be expected to maintain a force of little more than 2.0 million. The present number of personnel on active duty is about 3.3 million and it is scheduled to reach almost 3.5 million by June, 1968 if the present conflict is not concluded by then." H. Rep. No. 267, 90th Cong., 1st Sess. 38, 41 (1967).

zation from such legislative action as we have in this instance. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.

The choice, for example, between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent involves "the exercise of a discretion demonstrably committed to the . . . legislature," *Baker* v. *Carr*, *supra* at 211, and therefore, invokes the political question doctrine.

Such a choice involves an important area of decision making in which, through mutual influence and reciprocal action between the President and the Congress, policies governing the relationship between this country and other parts of the world are formulated in the best interests of the United States. If there can be nothing more than minor military operations conducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the President were agreed that they were necessary and were also agreed that a formal declaration of war would place the nation in a posture in its international relations which would be against its best interests. For the judicial branch to enunciate and enforce such a standard would be not only extremely unwise but also would constitute a deep invasion of the political question domain. As the Government says, " * * * decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry." It would, indeed, destroy the flexibility of action which the executive and legislative branches must have in dealing with other sovereigns. What has been said and done by both the President and the Congress in their collaborative conduct of the military operations in Vietnam implies a consensus on the advisability of *not* making a formal declaration of war because it would be contrary to the interests of the United States to do so. The making of a policy decision of that kind is clearly within the constitutional domain of those two branches and is just as clearly not within the competency or power of the judiciary.

Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the consitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions. *Baker* v. *Carr*, *supra*, at 217; *Powell* v. *McCormack*, *supra*, at 518.

The judgments of the district court are affirmed.

KAUFMAN, *Circuit Judge* (concurring):

In light of the adoption by Congress of the Tonkin Gulf Resolution, and the clear evidence of continuing and distinctly expressed participation by the legislative branch in the prosecution of the war, I agree that the judgments below must be affirmed.

PRESIDENTIAL STATEMENTS ACKNOWLEDGING NEED FOR EXPLICIT CONGRESSIONAL EXERCISE OF THE WAR POWER

During Jefferson's first administration, Tripoli attacked American vessels in the Mediterranean. After an American schooner, the *Enterprise*, had crippled an enemy cruiser, Jefferson reported to Congress:

"Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. *I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the legislature exclusively* their judgment may form itself on a knowledge and consideration of every circumstance of weight." 1 *State of the Union messages of the Presidents* 59 (Israel ed. 1966). [Emphasis added.]

Jefferson also asked for congressional authority in settling the dispute with Spain on the Florida border:

"That which they have chosen to pursue will appear from the documents now communicated. They authorize the inference that it is their intention to advance on our possessions until they shall be repressed by an opposing force. *Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided.* I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen, or his property; and the Spanish officers remaining at New Orleans are to depart without further delay. * * *

"But the course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny. To them I communicate every fact material for their information and the documents necessary to enable them to judge for themselves. To their wisdom, then, I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve." 1 *Messages and Papers of the Presidents*, 389–390 (Richardson Ed. 1908). [Emphasis added.]

When English vessels increased their raids on American commerce immediately before the war of 1812, President James Madison specifically asked Congress for guidance. In his message of June 1, 1812, he said:

"Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of events, avoiding all connections which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a *solemn question which the Constitution wisely confides to the legislative department of the Government.*" Quoted in Putney "Executive Assumption of the War Making Power," 7 *National University Law Review*, 1, 9 (May 1927). [Emphasis added.]

President Andrew Jackson similarly asked Congress for authority to protect American shipping in South American waters. In his third annual message Jackson said:

"In the course of the present year one of our vessels, engaged in the pursuit of a trade which we have always enjoyed without molestation, has been captured by a band acting, as they pretend, under the authority of the Government of Buenos Aires. I have therefore given orders of the dispatch of an armed vessel to join our squadron in those seas and aid in affording all lawful protection to our trade which shall be necessary, and shall without delay send a minister to inquire into the nature of the circumstances and also of the claim, if any, that is set up by the Government to those seas and aid in affording all lawful protection to our trade which shall be necessary, and shall without delay send a minister to inquire into the nature of the circumstances and also of the claim, if any, that is set up by that Government to those islands. In the meantime, I submit the case to the consideration of Congress, to the end that they may clothe the Executive with such authority and means as they may deem necessary for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in these seas." 1 *State of the Union Messages*, 352.

In the same message, Jackson commented about troubles with Spain:

"* * * I have therefore dispatched a special messenger with instructions to our minister to bring the case once more to his (i.e. the King of Spain) consideration, to the end that if (which I cannot bring myself to believe) the same decision (that cannot but be deemed an unfriendly denial of justice) should be persisted in, the matter may before your adjournment be laid before you, the constitutional judges of what is proper to be done when negotiations for redress of injury fails." *Ibid.* 349.

In 1848 President James K. Polk referred the problem of Yucatan to Congress:

"I have considered it proper to communicate the information contained in the accompanying correspondence, and I submit it to the wisdom of Congress to adopt such measures as in their judgment may be expedient to prevent Yucatan from becoming a colony of any European power, which in no event could be permitted by the United States. * * * 4 *Messages of the Presidents*, 583.

Ten years later President James Buchanan reiterated this view of the war power:

"Under our treaty with New Granada of the 12th December, 1846, we are bound to guarantee the neutrality of the Isthmus of Panama, through which the Panama Railroad passes, "as well as the rights of sovereignty and property which New Granada has and possesses over the said territory." This obligation

is founded upon equivalents granted by the treaty to the Government and people of the United States. Under these circumstances I recommend to Congress the passage of an act authorizing the President, in case of necessity, to employ the land and naval forces of the United States to carry into effect this guaranty of neutrality and protection." 1 *State of the Union Messages*, 953.

In his annual message of December 6, 1858, the same President said:

"The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks." *Ibid.*, 988.

Buchanan had occasion in his third annual message to repeat these views:

"It will not be denied that the general 'power to declare war' is without limitation and embraces within itself not only what writers on the law of nations term a public or perfect war, but also an imperfect war, and, in short, every species of hostility, however confined or limited. Without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy." *Ibid.*, 1018.

Abraham Lincoln took a similar view of the presidential war powers. Writing at the time of the Mexican War, Lincoln said:

"* * * Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose. * * *

"The provision of the Constitution giving the warmaking power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood." 2 *Writings of Abraham Lincoln*, 52 (Lapstez ed. 1905).

President Ulysses Grant recognized that he would have to come to Congress for authority to act abroad. In commenting on the situation in Cuba in 1875, he said:

"Persuaded, however, that a proper regard for the interests of the United States and of its citizens entitles it to relief from the strain to which it has been subjected by the difficulties of the questions and the wrongs and losses which arise from the contest in Cuba, and that the interests of humanity itself demand the cessation of the strife before the whole island shall be laid waste and larger sacrifices of life be made, I shall feel it my duty, should my hopes of a satisfactory adjustment and of the early restoration of peace and the removal of future causes of complaint be, unhappily, disappointed, to make a further communication to Congress at some period not far remote, and during the present session, recommending what may then seem to me to be necessary." 2 *State of the Union Messages*, 1302.

Chester Arthur also called for congressional authority to wage even limited war:

"A recent agreement with Mexico provides for the crossing of the frontier by the armed forces of either country in pursuit of hostile Indians. In my message of last year I called attention to the prevalent lawlessness upon the borders and to the necessity of legislation for its suppression. I again invite the attention of Congress to the subject." 2 *State of the Union Messages*, 1455.

President William Howard Taft refused to move into Mexico in 1911 despite the danger to American interests in that county:

"It seems my duty as Commander in Chief to place troops in sufficient number where, if Congress shall direct that they enter Mexico to save American lives and property, an effective movement may be promptly made. * * *

"The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority, under any circumstances, and if I had I would not exercise it without express congressional approval." 3 *State of the Union Messages*, 2447–2448.

More recently when Germany overran France in May and June 1940, Premier Paul Reynaud of France wired President Roosevelt for material assistance on June 10, 1940. President Roosevelt responded on June 15, 1940 that material and supplies would be sent in ever-increasing quantities and kinds. He continued:

"I know that you will understand that these statements carry with them no implication of military commitments. *Only the Congress can make such commitments.*" *The Public Papers and Addresses of Franklin D. Roosevelt*, 1940, 267. [Emphasis added.]

President Dwight D. Eisenhower said in a press conference on March 10, 1954: "There is going to be no involvement of America in war unless it is the result of the constitutional process that is placed upon Congress to declare it. Now let us have that clear."